S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 13, 2014
v LEWIS ARTHUR THOMPSON, Defendant-Appellant.	No. 314565 Kent Circuit Court LC No. 12-000574-FC

Before: OWENS, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree criminal sexual conduct, MCL 750.520b(1)(f) (force or coercion). He was sentenced as a fourth-offense habitual offender, MCL 769.12, to life imprisonment. We affirm.

I. FACTUAL BACKGROUND

On January 2, 2012, the victim encountered defendant outside of Degage Ministries in Grand Rapids. She observed that he was intoxicated. While the victim and defendant had a previous sexual relationship, it ended before this date but they had remained friends.

After helping him get something to eat, the victim accompanied defendant when he broke into an abandoned building. In the building, defendant continued to drink, and the victim joined him. Defendant eventually demanded sexual intercourse, but the victim refused. He then smashed her head against the wall, choked her, and removed her clothes. He also covered her mouth as she screamed. Defendant then penetrated her vagina with his penis and forced his fingers into her anal cavity, which caused her to bleed from her anus.

After the assault, the victim waited until defendant fell asleep and then left the building to call the police. The police entered the abandoned building and found defendant, who was passed out or asleep, in the basement. When the officers roused defendant, he still appeared intoxicated, and the zipper of his pants was undone. There was blood on his hand. While defendant claimed that he had cut himself, the blood was later tested and matched the victim's DNA. The sexual assault nurse who examined the victim testified that she had an abrasion on her hymen, three vaginal tears, and a labia tear. The nurse testified that these injuries were consistent with the victim's story of the assault.

Defendant, however, testified that he had an ongoing relationship with the victim and that on the night in question, he digitally penetrated her vagina with her consent. Defendant presented another witness—Bernard Harper—who testified that he spoke with the victim the day after the incident, and that she said she was going to tell the police that the incident did not happen like she had previously reported.

The jury ultimately found defendant guilty of first-degree criminal sexual conduct (force or coercion). With his status as a fourth-offense habitual offender, defendant was sentenced to life in prison. Defendant now appeals.

II. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

Defendant first contends that there was insufficient evidence to sustain his conviction. We review "de novo a challenge on appeal to the sufficiency of the evidence." *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). "In determining whether the prosecutor has presented sufficient evidence to sustain a conviction, an appellate court is required to take the evidence in the light most favorable to the prosecutor" to ascertain "whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010) (internal quotations and citations omitted). "All conflicts in the evidence must be resolved in favor of the prosecution and we will not interfere with the jury's determinations regarding the weight of the evidence and the credibility of the witnesses." *People v Unger*, 278 Mich App 210, 222; 749 NW2d 272 (2008).

B. ANALYSIS

MCL 750.520b(1) provides that a person is guilty of first-degree criminal sexual conduct if he engages in sexual penetration and:

> (f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration. Force or coercion includes, but is not limited to, any of the following circumstances:
>
> > (*i*) When the actor overcomes the victim through the actual application of physical force or physical violence.

"Sexual penetration" means "sexual intercourse . . . or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." MCL 750.520a(r). "The existence of force or coercion is to be determined in light of all circumstances . . . ." *People v Crippen*, 242 Mich App 278, 282-283; 617 NW2d 760 (2000). A complainant's testimony alone may be sufficient to support a conviction of criminal sexual conduct. MCL 750.520h; *People v Brantley*, 296 Mich App 546, 551; 823 NW2d 290 (2012).

In the instant case, the victim testified that defendant smashed her into a wall, choked her, and pulled down her shorts. Defendant then penetrated her vagina with his penis and forced his fingers into her anal cavity. The victim testified that she did not consent at any point. The

officers responding to the scene found defendant sleeping or passed out on the floor of the basement with the zipper of his pants undone. He had blood on his fingers, which later was identified as the victim's. The sexual assault nurse detailed that various injuries the victim sustained—abrasions on her hymen, three vaginal tears, and a labia tear—were consistent with the victim's story. Thus, there was sufficient evidence that defendant engaged in sexual penetration with the victim by the use force or coercion. MCL 750.520b(1); *Brantley*, 296 Mich App at 551.

Defendant's contentions amount to mere challenges to the credibility of the evidence, which we will not second-guess on appeal. *Unger*, 278 Mich App at 222. Defendant also claims that this Court should consider his intoxication. However, "first-degree criminal sexual conduct is a general-intent crime for which the defense of voluntary intoxication is not available." *People v Langworthy*, 416 Mich 630, 645; 331 NW2d 171 (1982); MCL 768.37(1). Thus, defendant has not established that he is entitled to reversal on sufficiency grounds.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

In his Standard 4 brief, defendant claims that he was denied the effective assistance of counsel on multiple occasions.

Generally, whether a defendant received effective assistance of counsel is a mixed question of fact and law, as a "trial court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). However, when reviewing a claim of ineffective assistance of counsel that has not been preserved for appellate review, we are limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

B. ANALYSIS

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise." *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). To establish a claim for ineffective assistance of counsel, a defendant first must establish that "counsel's representation fell below an objective standard of reasonableness." *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012) (quotation marks and citation omitted); see also *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Second, the defendant must show that trial counsel's deficient performance prejudiced his defense, meaning "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Vaughn*, 491 Mich at 669 (quotation marks and citation omitted); see also *Strickland*, 466 US at 687.

Here, defendant contends that his counsel failed to request complete discovery or to obtain evidence that would have severely undermined the victim's credibility. In particular, defendant alleges that his counsel failed to obtain evidence of the victim's prior false allegations of sexual assault or her convictions for possession of a controlled substance and retail fraud. However, none of this evidence is in the lower court record. See *People v Lockett*, 295 Mich

App 165, 186; 814 NW2d 295 (2012) (quotation marks and citation omitted) ("If the record does not contain sufficient detail to support defendant's ineffective assistance claim, then he has effectively waived the issue.").[1] In support of his claims, defendant relies on his affidavit, the report of a polygraph exam he took as part of his defense, and a letter from the prosecutor regarding the polygraph. However, none of these documents are "part of the lower court record and, therefore, [they] cannot be considered." *People v Seals*, 285 Mich App 1, 21; 776 NW2d 314 (2009). Regardless, none support his claim of ineffective assistance. Thus, defendant has failed to establish the factual predicate for his claims. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant also claims that his counsel was ineffective for failing to call several witnesses to testify and to elicit additional testimony from Bernard Harper that would have impeached the victim. However, "[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "This Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy, even if that strategy backfired." *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001). Other than merely claiming these witnesses would have provided impeachment testimony, defendant has not demonstrated that they would have testified in his favor. See *People v Kelly*, 186 Mich App 524, 527; 465 NW2d 569 (1990) (a substantial "defense would be one in which defendant's proposed [witness] verified his version."). Further, while defendant suggests that defense counsel should have somehow questioned Harper in a way that would have produced more favorable testimony, we will not second-guess strategic decisions on appeal. *Rockey*, 237 Mich App at 76.

Defendant also alleges that he was denied the effective assistance of counsel when his counsel failed to present his consent defense. "There is no doubt that based on the Fourteenth Amendment's Due Process Clause and the Sixth Amendment's Compulsory Process or Confrontation Clauses," a criminal defendant has a constitutional right to present a defense. *People v King*, 297 Mich App 465, 473; 824 NW2d 258 (2012). However, not only have we recognized that such a right is limited, defendant was not denied an opportunity to present this defense. "[I]t is patent from a review of the trial record that defendant was allowed to present evidence in the form of his testimony, . . . which, if the jury believed, would have provided defendant a complete defense to the charges brought against him." *King*, 297 Mich App at 474.

Furthermore, defendant has failed to analyze the second prong of *Strickland*, namely, that there is a reasonable probability that but for any alleged errors, the result of the proceedings would have been different. *Strickland*, 466 US at 687; *Vaughn*, 491 Mich at 669. In the instant case, consistent with the victim's story, the police officers verified that defendant was in an abandoned building, he appeared intoxicated, the zipper of his pants was undone, and that he had the victim's blood on his hand. The sexual assault nurse also corroborated that the victim had

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[1] Further, the victim is not listed on the Department of Corrections website as having such convictions.

abrasions on her genital region and that such injuries were consistent with the victim's story. Nothing suggests that but for the alleged errors the result would have been different.

Therefore, defendant has not demonstrated that he was denied the effective assistance of counsel or that remanding is warranted.

IV. COMPOSITION OF JURY

A. STANDARD OF REVIEW

Next, defendant argues that his Sixth Amendment right to a fair trial was violated because the jury was not composed of a fair cross section of the community. Because defendant did not make a timely objection, this issue is unpreserved. *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996). Unpreserved claims of constitutional error are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

B. ANALYSIS

"[W]aiver is the intentional relinquishment or abandonment of a known right." *Carines*, 460 Mich at 763 n 7 (quotation marks omitted). Moreover, a party who waives his rights "may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (quotation marks and citation omitted). In the instant case, defense counsel actively participated in jury selection and exercised challenges for cause or preemptory challenges. He then affirmatively approved of the jury composition, stating: "I'm satisfied with this jury." Therefore, defendant has waived any error on the grounds he now asserts on appeal.

Furthermore, defendant has failed to establish that his counsel behaved constitutionally ineffectively in relation to jury selection. "The Sixth Amendment of the United States Constitution guarantees a defendant the right to be tried by an impartial jury drawn from a fair cross section of the community." *People v Bryant*, 491 Mich 575, 595; 822 NW2d 124 (2012). To establish a prima facie case of a violation of the fair cross-section requirement, a defendant must show:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. [*Id.* at 596-597, quoting *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).]

In the instant case, other than merely alleging that there was not a fair cross-section, defendant has not satisfied this test. On appeal, defendant claims "that in Kent County a majority of jurors are drawn from the suburbs and a disproportionate number come from the City of Grand Rapids." Not only is this allegation unsupported by any record evidence, more importantly, it does not establish that the representation of African-Americans in jury venires is unfair or unreasonable. Defendant also has failed to establish that any alleged

underrepresentation of African Americans "is due to systematic exclusion of the group in the jury-selection process." *Duren*, 439 US at 364.

Thus, defendant has not established a prima facie case under *Duren*. Because "[c]ounsel is not ineffective for failing to make a futile objection[,]" defendant has failed to establish ineffective assistance of counsel or that remanding is warranted. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

V. CONCLUSION

Defendant's conviction was supported by sufficient evidence. He was not denied the effective assistance of counsel, nor has he established that his constitutional right to an appropriate jury composition was violated. We affirm.

/s/ Donald S. Owens
/s/ Christopher M. Murray
/s/ Michael J. Riordan