STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 23, 2014
v	No. 316948 Washtenaw Circuit Court
DAJUAN NAZAREE ROBERTS, Defendant-Appellant.	LC No. 12-000350-FH

Before: SAAD, P.J., and O'CONNELL and MURRAY, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of assault with intent to do great bodily harm less than murder, MCL 750.84; two counts of felonious assault, MCL 750.82; domestic violence, third offense, MCL 750.81(4); resisting a police officer, MCL 750.81d; three counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b; and unlawful imprisonment, MCL 750.349b. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to concurrent prison sentences of 50 to 90 years for the assault with intent to do great bodily harm conviction, the CSC I convictions, and the unlawful imprisonment conviction, and to a prison sentence of 10 to 15 years for the felonious assault convictions, the domestic violence conviction, and the resisting a police officer conviction. Defendant appeals as of right. We affirm.

First, defendant argues that his unlawful imprisonment conviction is not supported by sufficient evidence because there was no evidence that he restrained the victim or that she was secretly confined. We review a challenge to the sufficiency of the evidence de novo, *People v Harverson*, 291 Mich App 171, 177; 804 NW2d 757 (2010), viewing the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the evidence proved the essential elements of the crime beyond a reasonable doubt, *id*. at 175.

A person commits unlawful imprisonment if he restrains a person by means of a weapon or dangerous instrument. MCL 750.349b(1)(a); *People v Railer*, 288 Mich App 213, 217; 792 NW2d 776 (2010). "Restrain means to forcibly restrict a person's movements or to forcibly confine the person so as to interfere with that person's liberty without that person's consent or without lawful authority." MCL 750.349b(3)(a).

The victim testified that defendant held her captive during the nights of March 19 and 20, 2012, for the most part in his apartment and bedroom. She asked defendant if she could leave

the apartment, but he responded that he would kill her before he would let her leave. The victim testified that defendant either held a knife (at one point cutting the victim's chest) or a knife was located next to the bed during the entire episode. The presence of the knife, defendant's use of it, and defendant's threats to kill her kept her from even attempting to escape or contact people for help. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find beyond a reasonable doubt that defendant forcibly restricted the victim's movements or forcibly confined the victim so as to interfere with her liberty by use of a weapon or dangerous instrument. *Harverson*, 291 Mich App at 175; MCL 750.349b(1)(a) and (3)(a). This is sufficient to uphold defendant's conviction.

However, there was also sufficient evidence that the victim was secretly confined. MCL 750.349b(1)(b). "Secretly confined" means "to keep the confinement of the restrained person a secret" or "to keep the location of the restrained person a secret." MCL 750.349b(3)(b). "Secret confinement" is essentially the "deprivation of the assistance of others by virtue of the victim's inability to communicate his predicament." *People v Jaffray*, 445 Mich 287, 309; 519 NW2d 108 (1994). "[A] certain level of difficulty of discovery or escape" is not required. *People v Kosik*, 303 Mich App 146, 153; 841 NW2d 906 (2013). The victim testified that after defendant choked her, he refused her requests to leave. Although defendant's father and defendant's uncle were present in the apartment, the victim could not ask them for help because defendant was "right there" next to her. During the car ride, the victim did not ask defendant's father or his female friend for help because defendant was sitting next to her in the backseat. Defendant did not let the victim communicate with defendant's mother when she visited the apartment. He and the victim left the apartment to take a walk. On the walk, the victim saw cars, but she did not attempt to flag down any of the drivers. She did not attempt to get away from defendant because she could not outrun him. Defendant and the victim left the apartment again at 3:00 or 4:00 a.m. The victim was walking and defendant was on a bike. The victim could not ask anyone for help because the stores were all closed and no one approached them. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find beyond a reasonable doubt that defendant secretly confined the victim because she was unable to communicate her predicament. *Harverson*, 291 Mich App at 175; *Jaffray*, 445 Mich at 309. Defendant's conviction for unlawful imprisonment is supported by sufficient evidence.

Next, defendant argues that his first-degree criminal sexual conduct convictions must be vacated because there was insufficient evidence of unlawful imprisonment and it is unknown under which theory the jury convicted him of first-degree criminal sexual conduct.[1] As already discussed, defendant's conviction for unlawful imprisonment is supported by sufficient evidence, so this argument fails as well.

[1] Defendant was charged with first-degree criminal sexual conduct under three theories: (1) the circumstances involved the commission of any other felony; (2) defendant was armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon; or (3) defendant caused personal injury to the victim and force or coercion was used to accomplish the sexual penetration.

Finally, defendant argues that the failure of the police and the prosecutor to preserve and produce the knife and the coat hanger deprived him of (1) the ability to defend himself and (2) the right to due process.[2] Because defendant did not raise this argument before the trial court, it is unpreserved. See *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). We review unpreserved constitutional issues for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The prosecution's suppression of evidence favorable to a defendant violates due process where the evidence is material either to the defendant's guilt or to punishment. *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). The elements of a *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). Regardless of the prosecution's good or bad faith, "[t]he government is held responsible for evidence within its control, even evidence unknown to the prosecution . . . ." *Id.* In the present case, there was no *Brady* violation. Deputy Heather Morrison did not collect the knife and hanger because she was directed by her superior officer to accompany the victim to the hospital. The following day, when Detective Michael Babycz, who was assigned to conduct a follow-up investigation, was made aware of the knife and hanger, he went to the apartment to retrieve them. But they were gone. Accordingly, the government was never in possession of the knife and hanger, and they were not suppressed by the prosecution.

In addition, the failure of the police to preserve potentially useful evidence does not constitute a due process violation unless the defendant can show bad faith on the part of the police. *Arizona v Youngblood*, 488 US 51, 58; 109 S Ct 333; 102 L Ed 2d 281 (1988). Here, there is no evidence that the police acted in bad faith by not collecting the knife and hanger. Morrison took pictures of the knife and hanger, but she did not collect them because she was directed to accompany the victim to the hospital. The next day, when Babycz was made aware of the two items, he went to the apartment to retrieve them, but they were gone. Babycz testified that failing to collect the knife and hanger the previous day had been a mistake. Although the failure to collect the knife and hanger may constitute negligence, nothing in the record shows it was done in bad faith. *Id.* Because there is no evidence that the police acted in bad faith, defendant has not established plain error affecting his substantial rights. *Carines*, 460 Mich at 763.

Affirmed.

/s/ Henry William Saad
/s/ Peter D. O'Connell
/s/ Christopher M. Murray

[2] The victim testified that defendant bent a clothes hanger into the shape of a "Y" and a "B," the initials for his nickname "Young Boop," and heated it with a lighter. He then branded the victim's buttocks with the hot hanger.