

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

ADIL HNIKER,

Defendant-Appellant.

UNPUBLISHED

September 10, 2026

11:21 AM

No. 373332

St. Clair Circuit Court

LC No. 23-002412-FH

Before: LETICA, P.J., and O'BRIEN and REDFORD, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of third-degree criminal sexual conduct (CSC-III), MCL 750.520d(1)(b) (force or coercion), and fourth-degree criminal sexual conduct (CSC-IV), MCL 750.520e(1)(b) (force or coercion). Defendant was sentenced to 4 to 15 years' imprisonment for his CSC-III conviction and one to two years' imprisonment for his CSC-IV conviction to be served concurrently. On appeal, defendant argues (1) the trial court abused its discretion in denying his motion for a mistrial after the prosecutor committed misconduct by eliciting inadmissible other-acts testimony, (2) he was denied his right to present a defense when the trial court refused to instruct the jury on consent, (3) he was denied his right to testify, either by the trial court or trial counsel's ineffectiveness, when the trial court apparently refused to reopen proofs following an in-chambers discussion on jury instructions, and (4) he is entitled to resentencing because the trial court improperly assessed 15 points for Offense Variable (OV) 8, MCL 777.38. We affirm the convictions, but because we find that OV 8 was improperly scored, we remand this matter to the trial court for resentencing in accordance with this opinion.

I. FACTS

Defendant was best friends with the victim's boyfriend, and at the time of the assault, had been friends with the victim for over a year. Defendant often referred to the victim as "Sis." On June 23, 2023, the victim spent the day with her boyfriend and defendant, but went home after arguing with her boyfriend. That night, she met her friend, Chad Briggs, at a local bar, and when defendant texted her to see where she was, the victim first offered that he could meet them at the bar. Later, after she and Briggs left the bar and went to a local restaurant; once there, they

discovered it was going to close soon. After that, she called defendant and accepted his invitation to come to his apartment. She and Briggs drove separately to the apartment at around 2:00 a.m. The victim drank half a beer at defendant's apartment and after lying down on his couch, fell deep asleep in her jeans and t-shirt. Defendant offered that Briggs could stay the night, but he declined and he left between 3:00 a.m. and 3:30 a.m.

Sometime after, the victim awoke on the couch, naked from the waist down, with defendant over top of her with his pants off. He was kissing the victim's neck and digitally penetrating her vagina in a forceful and painful manner. She used her leg to kick him off, at which time he attempted to kiss her on the lips. She bit his lip, fell to the floor, yelled at defendant to tell him that she could not believe his behavior, and after putting on her clothes, left the apartment around 4:10 a.m. Defendant asked the victim not to tell her boyfriend, to which she agreed because she wanted to leave. After the assault, defendant sent the victim a text asking if she made it home okay and also stated, "I'm quitting drinking. It's not good for me." The victim testified that she inferred from this text that defendant "knew he did wrong" to her.

Later in the day, on June 24, 2023, after encouragement from Briggs, the victim went to the hospital and disclosed the assault. Stephanie Zecman, a sexual assault nurse examiner at Turning Point, performed a forensic examination on the victim, taking multiple swabs from various points on the victim's body. When Detective Laura Phillips interviewed defendant, he described the victim as "like a sister." Defendant denied kissing or physically touching the victim, and gave a buccal swab, asserting his DNA would not be found on her. Contrary to defendant's assertion, his DNA was subsequently found on swabs from the victim's neck and genitalia.

At the outset of trial, defense counsel requested an order documenting his understanding that there would be no other-acts evidence raised through any witness because he had no notice of this. The prosecutor agreed, stating that she chose not to call a witness she initially considered who may have testified about other-acts evidence. However, during direct examination, other-acts evidence was presented through the victim's testimony. Specifically, in a line of questioning related to the victim's experience during the investigation and how many times she had to relay the events, the prosecutor asked the victim why she decided to report the assault. The victim testified, "I know that he has tried to do it with other people." Defense counsel immediately objected, and the trial court sustained the objection, striking it from the record. The prosecutor rephrased the question to ask whether the victim was "just trying to get [defendant] in trouble" when she chose to come forward, to which the victim answered "no." The prosecutor then asked if she chose to come forward for herself, to which the victim answered "yes."

Outside the presence of the jury, defense counsel moved for a mistrial. He reminded the trial court of their earlier discussion "specifically addressing other acts evidence" and that it was represented that there would be no other-acts evidence coming out at trial. The victim's statement was "very clear" testimony of other-acts evidence, which the jury heard, and defense counsel averred that he "could even see surprise on their faces." He stated, "[w]e can't unring this bell." The trial court denied the motion, finding that the witness's comment was unsolicited and immediately cured by the court's order striking it from the record and instructing the jury not to consider it. The trial court also cautioned the witness that it was her job to respond to the questions that are presented, no more and no less, and that if she failed to do that, "it could rise to the level of a mistrial and we would have to start this process all over again."

On cross-examination, the victim agreed that she was pretty close with defendant, they called each other “brother” and “sister,” and generally hugged when saying hello and goodbye. Defendant introduced friendly text messages sent between them, which the victim denied as representing that she had romantic feelings for defendant because she spoke to all of her friends that way.

Near the end of the close of proofs, defense counsel placed his client’s waiver of his right to testify on the record. Defense counsel told defendant that it was his right to testify, that his silence could not be used against him, but if he testified that his words could be used against him. Defendant answered, “correct.” Defense counsel asked defendant “that’s your understanding and you’re waiving your right to testify?” and defendant responded, “Yes I do.” The trial court then placed defendant under oath, and defendant again affirmed under oath that he did not wish to testify. The prosecutor engaged in a short redirect to clarify the dates in two laboratory reports, and both parties rested.

After the close of proofs, the trial court held an in-chambers meeting with counsel to discuss jury instructions. Defense counsel requested an instruction on consent, which the trial court declined because his “assessment of the evidence [was] that there is not sufficient evidence on the record for that instruction to be given.” A text message from the victim inviting defendant to join her at the bar, which defendant believed would result in a meeting with the victim alone, was not a sufficient basis for consent given that it was “crystal clear” that the victim was deep asleep, passed out or intoxicated when defendant initiated the sexual contact. The trial court stated that “[t]here’s absolutely nothing to suggest that she was awake and did anything that would be remotely close to consenting to any form of sexual conduct or contact.” Defense counsel placed on the record that in-chambers, he indicated that his client may be willing to withdraw his waiver of his right to testify, and the trial court declined to reopen proofs. No details were given as to what facts or other evidence defendant may have presented in support of his defense. The jury convicted defendant of both charges. This appeal followed.

II. MOTION FOR MISTRIAL

On appeal, defendant first argues the trial court abused its discretion when it denied his motion for a mistrial because the prosecutor’s misconduct¹ violated his constitutional rights to due process and a fair trial. Specifically, defendant argues the prosecutor improperly elicited inadmissible testimony from the victim that defendant sexually assaulted other victims.

A. STANDARD OF REVIEW

A motion for “[a] mistrial should be granted only where the error complained of is so egregious that the prejudicial effect can be removed in no other way.” *People v Gonzales*, 193

¹ This Court noted in *People v Cooper*, 309 Mich App 74, 87-88; 867 NW2d 452 (2015), that the phrase “prosecutorial misconduct” serves as a term of art often used to describe any error committed by the prosecution, even though claims of inadvertent error by the prosecution are “better and more fairly presented as claims of ‘prosecutorial error,’ with only the most extreme cases rising to the level of ‘prosecutorial misconduct.’ ”

Mich App 263, 266; 483 NW2d 458 (1992). This Court reviews a trial court’s decision on a motion for a mistrial for an abuse of discretion. *People v Caddell*, 332 Mich App 27, 37; 955 NW2d 488 (2020). “An abuse of discretion occurs when the trial court chooses an outcome that falls outside the range of principled outcomes.” *Id.* (quotation marks and citation omitted).

B. ANALYSIS

Defendant claims a mistrial is warranted because of prosecutorial misconduct. “The test for prosecutorial error is whether the defendant was denied a fair trial.” *People v Thurmond*, 348 Mich App 715, 736; 20 NW3d 311 (2023). “To preserve a claim of prosecutorial error, a defendant must timely and specifically challenge the prosecutor’s statements or conduct.” *Id.* at 735. In this case, defense counsel preserved this issue by promptly objecting to the prosecutor’s statement and then sought a mistrial outside of the jury’s presence.

Defendant claims that the prosecutor’s questioning implicates his due-process rights. “The United States Constitution and the Michigan Constitution each guarantee that a criminal defendant receives due process of law.” *People v Horton*, 341 Mich App 397, 401; 989 NW2d 885 (2022), citing US Const, Am XIV; Const 1963, art 1, § 17. “Implicit in this guarantee is that each criminal defendant enjoys the right to a fair trial . . .” *Horton*, 341 Mich App at 401. Importantly, defendant is “entitled to a fair trial but not a perfect one for there are no perfect trials.” *People v Miller*, 482 Mich 540, 559-560; 759 NW2d 850 (2008) (quotation marks and citation omitted). The error alleged here is an improper question from the prosecutor that occurred during the presentation of the case to the jury. Both federal and state precedent require that the statement be evaluated in context of the evidence and argument presented in the case. *People v Anderson (After Remand)*, 446 Mich 392, 405-406; 521 NW2 538 (1994); *People v Dobek*, 274 Mich App 58, 63-64; 732 NW2d 546 (2007). Federal constitutional rights require a determination whether the error was “harmless beyond a reasonable doubt” or whether “there is no reasonable possibility that the evidence complained of might have contributed to the conviction.” *Anderson*, 446 Mich App at 405-406 (quotation marks and citation omitted). “A motion for a mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs the defendant’s ability to get a fair trial.” *People v Dickinson*, 321 Mich App 1, 18; 909 NW2d 24 (2017) (quotation marks and citation omitted).

There is no dispute that the victim’s statement that she reported the assault because of information that defendant had assaulted others was inadmissible. Under MRE 404(b), evidence of other crimes, wrongs, or other acts is inadmissible to prove a defendant acted in conformity with those acts. *People v Watkins*, 491 Mich 450, 468; 818 NW2d 296 (2012). The reason for this general prohibition is that “propensity evidence might weigh too much with the jury and . . . so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.” *Id.* at 468-469 (quotation marks and citation omitted). Accordingly, the parties and the court agreed at the outset of trial that no other-acts evidence would be introduced, and the statement of other-acts evidence was immediately stricken by the trial court, followed by an appropriate instruction to the jury and a strong caution to the witness to avoid such testimony in the future.

The trial court's decision to deny defendant's motion for a mistrial falls within the range of principled outcomes and satisfies the harmless-error test on appeal. *Caddell*, 332 Mich App at 37; *Anderson*, 446 Mich at 406.

First, the record supports the trial court's finding that the victim's statement was unresponsive to the prosecutor's question when evaluated in context. Specifically, it arose within a line of questioning related to her feelings after the assault, the arduous process of cooperating with a sexual assault investigation, and the impact that her decision to report the assault had on her personal relationships, including with defendant whom she previously considered a friend. In this context, the prosecutor's inquiry into why the victim decided to report the assault was not a blatant attempt to solicit information regarding defendant's conduct with others but rather one question within an inquiry as to whether she reported the assault because of a personal vendetta. The prosecutor's immediate rephrasing of the question clarified this, as she asked the victim whether she was only attempting to get defendant in trouble or whether she came forward for herself.

Likewise, the record does not support a finding that the prosecutor knew in advance that the victim would disclose other acts or that the prosecutor "conspired with or encouraged" the victim to give that testimony. See *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). At the outset of trial, the prosecutor agreed with defense counsel that no other-acts evidence would be offered and that she had, in fact, released a witness who may have testified about evidence to which MRE 404(b) would have applied. Also, when the victim answered her question by inserting other-acts evidence, the prosecutor immediately rephrased it to clarify her intention of inquiring into whether the victim reported the sexual assault out of vindictive feelings toward defendant. There is no indication the prosecutor sought to elicit inadmissible testimony or otherwise acted in bad faith when asking the victim why she chose to report, and "[a] prosecutor's good-faith effort to admit evidence does not constitute misconduct." *Dobek*, 274 Mich App at 70.

Even if the other-acts testimony could be attributed to misconduct by the prosecutor, the trial court appropriately found that the statement was not so egregious that it required a mistrial. "A motion for a mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs the defendant's ability to get a fair trial." *Dickinson*, 321 Mich App at 18 (quotation marks and citation omitted). "The proper analysis for a motion for mistrial depends principally, if not exclusively, on whether a defendant has been prejudiced by an irregularity or error." *People v Beesley*, 337 Mich App 50, 55; 972 NW2d 294 (2021). "Thus, for a due process violation to result in reversal of a criminal conviction, a defendant must prove prejudice to his or her defense." *Id.* at 54 (quotation marks and citation omitted). Further, the defendant "must establish that the error complained of is so egregious that the prejudicial effect can be removed in no other way." *Dickinson*, 321 Mich App at 18 (quotation marks and citation omitted).

Generally, "an unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). Indeed, "unresponsive answers may work a certain amount of mischief with the jury, but they are generally not considered prejudicial errors unless egregious or not amenable to a curative instruction." *People v Mahone*, 294 Mich App 208, 213; 816 NW2d 436 (2011) (quotation marks and citation omitted).

This case is distinct from *People v Ullah*, 216 Mich App 669, 672-673; 550 NW2d 568 (1996), in which this Court ordered a new trial after the prosecutor directly solicited prior bad-acts evidence through several pointed questions directed to the victim as she testified and which continued even after the trial court sustained defense counsel's objection and ordered the comments stricken from the record. This Court agreed with the trial court's finding that the other bad-acts evidence was not admissible under MRE 404(b) and substantially more prejudicial than probative. However, the trial court's action in striking the testimony and preventing further questioning "simply came too late because the jury had already heard unfairly prejudicial testimony regarding a brutal incident that occurred two days after [the] defendant and the complainant had married that was unrelated to the charged offenses." *Id.* at 672-674. The trial court found these bad acts were not relevant to the issue of consent in this trial involving sexual assault, and the error was "simply too prejudicial to be deemed harmless." *Id.* at 676.

In this case, the prosecutor asked a single, open-ended question within a series of questions related to the victim's personal experience regarding the assault. The victim answered by referencing knowledge of similar conduct with other individuals. Nothing in the record supports a finding that the prosecutor knew in advance that this question would bring out evidence prohibited under MRE 404(b). When defense counsel immediately objected, the prosecutor rephrased the question to avoid testimony of other-acts evidence. Moreover, defendant overstates the prejudice arising from this single question. Contrary to defendant's claims on appeal, this case did not come down to a credibility determination between the victim and defendant. In addition to the victim's testimony, the jury heard testimony that in his interview with Detective Phillips, defendant denied having a relationship with the victim or physically touching her, and insisted his DNA would not be found on her. Contrary to his statements, defendant's DNA was located on the victim's neck and genitals, which was consistent with the victim's version of events.

Further, defense counsel immediately objected to the victim's testimony, and the trial court sustained the objection, striking the victim's statement from the record. "A witness cannot bring error into a case by volunteering inadmissible testimony which is immediately stricken out." *People v Barker*, 161 Mich App 296, 306; 409 NW2d 813 (1987) (quotation marks and citation omitted). Because the trial court found striking the testimony was sufficiently curative, it did not contemporaneously give the jury a curative instruction, nor did defense counsel request one. However, before deliberations, the trial court specifically instructed the jury not to consider any stricken testimony when deciding the case and that it could only consider the evidence admitted at trial. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Because the trial court struck the challenged testimony and instructed the jury not to consider it, defendant has not demonstrated prejudicial error warranting a mistrial.

In sum, the victim's testimony was an unresponsive, volunteered response to an appropriate question. Because there was no indication the prosecutor intentionally elicited the comment, defendant has failed to establish prosecutorial misconduct. Further, because the comment was immediately stricken by the trial court, defendant has failed to show prejudicial error impairing his ability to receive a fair trial. See *Dickinson*, 321 Mich App at 18. As such, the trial court did not abuse its discretion when it denied defendant's motion for a mistrial. See *Caddell*, 332 Mich App at 37.

III. RIGHT TO PRESENT A DEFENSE

Defendant argues the trial court's refusal to provide the jury with an instruction on consent denied him his constitutional right to present a defense. Additionally, defendant argues the trial court violated his right to testify when it denied his request to withdraw his waiver of that right, which in turn violated his right to present a defense. Alternatively, defendant argues defense counsel was unconstitutionally ineffective for advising him not to testify without first determining whether the trial court would have allowed a consent instruction.

A. STANDARDS OF REVIEW

A defendant has a constitutional right to present a defense. See US Const, Am VI; Const 1963, art 1, § 20. This Court reviews "de novo the question whether a defendant was denied the constitutional right to present a defense." *People v Unger*, 278 Mich App 210, 247; 749 NW2d 272 (2008). While this Court reviews jury instruction issues involving questions of law de novo, "a trial court's determination whether a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion." *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006) (quotation marks and citation omitted). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Unger*, 278 Mich App at 217.

A claim of ineffective assistance of counsel "presents a mixed question of fact and constitutional law." *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). "The 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). "A trial court's findings of fact, if any, are reviewed for clear error, and this Court reviews the ultimate constitutional issue arising from an ineffective assistance of counsel claim de novo." *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). "Clear error exists if the reviewing court is left with a definite and firm conviction that the trial court made a mistake." *Armstrong*, 490 Mich at 289. "Where claims of ineffective assistance of counsel have not been preserved, our review is limited to errors apparent on the record." *Matuszak*, 263 Mich App at 48.

B. JURY INSTRUCTIONS

"Instructional errors that directly affect a defendant's theory of defense can infringe a defendant's due process right to present a defense." *People v Kurr*, 253 Mich App 317, 326-327; 654 NW2d 651 (2002). "A criminal defendant is entitled to have a properly instructed jury consider the evidence against him." *People v Armstrong*, 305 Mich App 230, 239; 851 NW2d 856 (2014) (quotation marks and citation omitted). "The jury instructions must include all elements of the crime charged, and must not exclude from jury consideration material issues, defenses or theories if there is evidence to support them." *Id.* at 240 (quotation marks and citation omitted). Jury instructions should be considered in their entirety when determining whether an error occurred. *People v Wade*, 283 Mich App 462, 464; 771 NW2d 447 (2009). "No error results from the absence of an instruction as long as the instructions as a whole cover the substance of the missing instruction." *Kurr*, 253 Mich App at 327. "Even if somewhat imperfect, instructions do

not warrant reversal if they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Id.*

"In the context of the CSC statutes, consent can be utilized as a defense to negate the elements of force or coercion." *People v Waltonen*, 272 Mich App 678, 689; 728 NW2d 881 (2006). However, "an instruction that is without evidentiary support should not be given." *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999). Indeed, the consent instruction, M Crim JI 20.27, is accompanied by a usage note stating it "should be given only where there is evidence of consent." See Use Note, M Crim JI 20.27.

The trial court found there was insufficient evidence to warrant instructing the jury on consent because there was nothing to suggest the victim was awake to consent to any sexual contact with defendant. According to defendant, sufficient evidence of consent was presented through his cross-examination of the victim, which established (1) defendant was best friends with the victim's boyfriend, (2) defendant and the victim referred to each other as siblings, (3) the victim had been drinking and argued with her boyfriend, (4) the victim invited defendant to join her at a bar, and (5) the victim drove herself to defendant's apartment. These allegations do not constitute evidence that the victim affirmatively consented to sexual contact with defendant. She testified that she was asleep when defendant sexually assaulted her and denied the contact was consensual. Defendant did not provide any evidence to contradict this, and in fact, denied sexual contact with the victim during the investigation only to have his DNA found on her genitals. This evidence supports the victim's testimony that she considered defendant a friend and felt safe enough to fall asleep on his couch only to be woken up by unexpected, unwanted sexual contact. Accordingly, the trial court did not abuse its discretion when determining a consent instruction was inapplicable because it was within the bounds of reasonable outcomes. See *Gillis*, 474 Mich at 113.

Further, by instructing the jury on the elements of the crimes charged, the jury was necessarily instructed that to find defendant guilty, it must find the victim did not consent. The consent instruction informs the jury that "[a] person consents to a sexual act by agreeing to it freely and willingly, without being forced or coerced." M Crim JI 20.27(1). Here, the trial court instructed the jury that to convict defendant of CSC-III and CSC-IV involving the use of force or coercion, the jury had to find the element of force or coercion beyond a reasonable doubt. See MCL 750.520d(1)(b) and MCL 750.520e(1)(b). This Court has explained that a consent instruction is not necessary where the jury must find the element of force or coercion before convicting a defendant because the trial court's instructions "implicitly required the jury to find that the complainant did not consent to sexual [contact] before it could find defendant guilty." See *Matuszak*, 263 Mich App at 59 (quotation marks and citation omitted); *People v Hale*, 142 Mich App 451, 453-454; 370 NW2d 382 (1985); *People v Johnson*, 128 Mich App 618, 623; 341 NW2d 160 (1983). See also *People v Jansson*, 116 Mich App 674, 682-683; 323 NW2d 508 (1982) (explaining if "the prosecution offers evidence to establish that an act of sexual penetration was accomplished by force or coercion, that evidence necessarily tends to establish that the act was nonconsensual.").

Accordingly, under the instructions provided, the jury could not convict defendant of CSC-III and CSC-IV unless it found beyond a reasonable doubt the victim did not consent to the sexual contact. When examined as a whole, the jury instructions sufficiently protected defendant's rights. See *Kurr*, 253 Mich App at 327; *Wade*, 283 Mich App at 464. As such, defendant has not

established an instructional error infringing on his constitutional right to present a defense. See *Kurr*, 253 Mich App at 326-327.

C. RIGHT TO TESTIFY

“A defendant’s right to testify in his own defense arises from the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution.” *People v Bonilla-Machado*, 489 Mich 412, 419; 803 NW2d 217 (2011). See US Const, Am V, VI, and XIV. “Although counsel must advise a defendant of this right, the ultimate decision whether to testify at trial remains with the defendant.” *Bonilla-Machado*, 489 Mich at 419. “If a defendant expresses a wish to testify at trial, the trial court must grant the request, even over counsel’s objection.” *People v Spaulding*, 332 Mich App 638, 656; 957 NW2d 843 (2020) (quotation marks and citation omitted). “However, if a defendant decides not to testify or acquiesces in his attorney’s decision that he not testify, the right will be deemed waived.” *Id.* at 657 (quotation marks and citation omitted). Moreover, the decision here is “trial error” and, therefore subject to the harmless-error analysis and requires the prosecution bear a heavy burden in demonstrating that the “error was harmless beyond a reasonable doubt in light of the uncertain effect of the defendant’s testimony on the jury.” *People v Solomon*, 220 Mich App 527, 533-538; 560 NW2d 651 (1996). In this case, we do not find that defendant was deprived of his right to testify on his own behalf and even if the trial court abused its discretion in declining to reopen proofs, the error was harmless beyond a reasonable doubt.

First, defendant freely and knowingly waived his right to testify on his own behalf. Waiver is the “intentional relinquishment or abandonment of a known right.” *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (quotation marks and citation omitted). “One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error.” *Id.* (quotation marks and citation omitted). Here, defendant confirmed under oath and on the record that he was voluntarily waiving his right to testify. The colloquy between defense counsel and defendant on the record occurred after he had heard all of the prosecutor’s witnesses. All that remained after he waived his right to testify was redirect of a witness explaining why the dates that the evidence was received in two laboratory reports were five days apart. This questioning explained a chain of custody without any implications for defendant’s testimony or his consent. Moreover, the colloquy leaves no question that defendant understood his rights and was expressly waiving them. He testified that he knew he had the right to testify, confirmed that no one had the right to decide this for him, understood that it was his opportunity to testify, and acknowledged that while his silence could not be used against him, any testimony that he provided could be used against him. After this questioning, defendant stated: “I do not wish to testify.” As such, defendant’s waiver of his right to testify extinguished any error. See *Carter*, 462 Mich at 215. Defendant also chose not to call any witnesses to testify on his behalf.

Second, defendant gave no clear indication he wished to withdraw his waiver and testify or what, in fact, he would testify about in order to support application of consent. The record indicates that defense counsel asked the trial court in an in-chambers meeting to discuss jury instructions, whether defendant “would be able to withdraw his waiver [of his right to testify] if he wanted to[.]” And the trial court declined that opportunity, deciding defendant “gave up that right.” At that point, the proofs were closed. “Generally, the reopening of proofs for either the prosecution or defense rests within the sound discretion of the trial judge.” *Solomon*, 220 Mich

App at 532 (quotation marks and citation omitted). Defendant offers no authority or argument for why he should have been allowed to withdraw his waiver or why the trial court abused its discretion in not reopening the proofs after defendant waived his right to testify. As such, defendant's argument in this regard is abandoned. See *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004) ("The failure to brief the merits of an allegation of error constitutes an abandonment of the issue."). See also *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) ("An 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 with little or no citation of supporting authority.").

Third, the jury heard the testimony and evidence on which defendant relied when requesting the jury instruction on consent. A defendant's right to present a defense is not violated if the defendant is otherwise able to present his theory to the jury with other evidence. See *People v Steele*, 283 Mich App 472, 489; 769 NW2d 256 (2009). All of the evidence that defense counsel referred to in support of consent came in through other witnesses at trial. Clearly, defendant believed his defense was properly presented without his testimony.

Finally, even if the trial court erred in not reopening proofs, the error was harmless beyond a reasonable doubt. Defendant waived his right to testify after hearing all of the testimony presented by the prosecution in support of his convictions. The only reason he potentially would have relinquished this waiver was to bolster a defense of consent; however, the uncontroverted testimony was that he denied sexual contact with the victim and, then, DNA tests supported a finding that sexual contact had occurred. Moreover, the victim testified that she was not awake during the sexual encounter. The evidence as a whole strongly counters against the instruction on consent and to refute this, defendant would have had to address prior inconsistent statements that he made. If the trial court erred in refusing to reopen proofs, the error was harmless beyond a reasonable doubt and provides no basis for a new trial.

D. INEFFECTIVE ASSISTANCE OF COUNSEL

The United States and Michigan Constitutions entitle a criminal defendant to assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. Counsel must be effective to satisfy the constitutional requirement. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "Effective assistance is strongly presumed, and the defendant bears the heavy burden of proving otherwise." *People v Haynes*, 338 Mich App 392, 429; 980 NW2d 66 (2021). "In order to obtain a new trial because of ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that [the] outcome would have been different." *People v Yeager*, 511 Mich 478, 488; 999 NW2d 490 (2023) (quotation marks and citation omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quotation marks and citation omitted).

"The defendant has the burden of establishing the factual predicate of his ineffective assistance claim." *People v Douglas*, 496 Mich 557, 592; 852 NW2d 587 (2014). To show trial counsel's performance failed to meet an objective standard of reasonableness, "a defendant must overcome the strong presumption that counsel's performance was born from a sound trial strategy." *Id.* at 585 (quotation marks and citation omitted). "If this Court can conceive of a

legitimate strategic reason for trial counsel's act or omission, this Court cannot conclude that the act or omission fell below an objective standard of reasonableness." *Haynes*, 338 Mich App at 429-430. However, the strategy "in fact must be sound, and counsel's decisions as to it objectively reasonable; a court cannot insulate the review of counsel's performance by calling it trial strategy." *Douglas*, 496 Mich at 585 (quotation marks and citation omitted).

As a preliminary matter, any claim that defense counsel advised defendant not to testify is refuted by defendant's sworn testimony that he made this decision of his own volition. Moreover, despite citing extensive caselaw on this issue, to make this assertion, defendant must overcome the presumption that such advice might be considered sound trial strategy. See *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). This Court will not substitute its judgment for defense counsel regarding trial strategy. See *Unger*, 278 Mich App at 242-243. Further, we cannot say this advice would have been unreasonable considering the other evidence presented at trial, including defendant's prior statements to Detective Phillips that he never touched the victim. It would have been reasonable for defense counsel to advise against introducing inconsistent evidence, opening defendant up to cross-examination, and damaging any of defendant's remaining credibility. Moreover, while this may have been defense counsel's advice, "the ultimate decision whether to testify at trial remains with the defendant." *Bonilla-Machado*, 489 Mich at 419. Defendant's ineffective assistance claim fails because he has failed to establish defense counsel acted unreasonably or a reasonable probability exists that the result of his trial would have been different had he testified.

IV. OV 8

Finally, defendant argues he is entitled to resentencing because he was improperly assessed 15 points for OV 8. This issue was preserved through a timely objection by defense counsel.

A. STANDARD OF REVIEW

"Under the sentencing guidelines, the [trial] court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013), superseded in part by statute on other grounds as stated by *People v Rodriguez*, 327 Mich App 573, 579 n 3; 935 NW2d 51 (2019). "Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made." *People v Blevins*, 314 Mich App 339, 348-349; 886 NW2d 456 (2016). "'Preponderance of the evidence' means such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth." *People v Cross*, 281 Mich App 737, 740; 760 NW2d 314 (2008). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Hardy*, 494 Mich at 438.

B. ANALYSIS

The trial court assessed 15 points for OV 8, which considers "victim asportation or captivity." MCL 777.38(1). OV 8 requires the trial court to assess 15 points 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." MCL 777.38(1)(a). "Asported" is defined in

this statute as carrying away the victim or moving her to a situation of greater danger. *People v Barrera*, 500 Mich 14, 21; 892 NW2d 789 (2017).

We conclude the record does not support scoring 15 points for OV 8. There is no evidence that the victim was asported. To the contrary, she testified that she invited defendant to join her and Briggs at the bar, then called or texted him from the restaurant for the purpose of accepting his invitation to come to his apartment, voluntarily drove herself to his apartment, and laid down on the couch, and awoke to the assault taking place. The record evidence refutes a finding that defendant carried the victim away or moved her to a place of greater danger. No asportation occurred.

Likewise, the victim's testimony does not support the finding that she was held captive for a longer time than necessary to commit the offense. See MCL 777.38(1)(a). The victim did not testify about any physical or psychological restraint by defendant. Contra *People v Allen*, 331 Mich App 587, 599; 953 NW2d 460 (2020), vacated in part on other grounds 507 Mich 856 (2021). When she awoke and found defendant on top of her, she testified that she kicked him off and bit his lip when he attempted to kiss her on the lips. While she testified that she agreed not to tell her boyfriend at defendant's request so that she could leave, the record is void of any oral statement or physical action by defendant supporting a finding that defendant prevented her from leaving his apartment. The trial court clearly erred in scoring 15 points for OV 8. Because removing these 15 points from his score would have reduced his OV level to II and reduced his minimum sentence guidelines range, we agree with defendant that resentencing is required. *People v Francisco*, 474 Mich 82, 91-92; 711 NW2d 44 (2006).

We affirm defendant's convictions for CSC-III and CSC-IV. However, we remand for resentencing under a sentencing guidelines range that does not include 15 points for OV 8. We do not retain jurisdiction.

/s/ Anica Letica

/s/ Colleen A. O'Brien

/s/ James Robert Redford