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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK DEEN WRIGHT II,

Defendant-Appellant.

UNPUBLISHED
November 09, 2026
9:25 AM

No. 371247
Ingham Circuit Court
LC No. 19-000166-FC

Before: BORRELLO, P.J., and BAZZI and LIEVENSE, JJ.

PER CURIAM.

Defendant appeals as of right his convictions following a jury trial of first-degree criminal sexual conduct (CSC-I), MCL 750.520b, and unlawful imprisonment, MCL 750.349b. Defendant was sentenced to 270 to 480 months' imprisonment for his CSC-I conviction and 86 to 180 months' imprisonment for his unlawful imprisonment conviction, with the sentences to be served concurrently. For the reasons set forth in this opinion, we affirm.

I. BACKGROUND

This appeal arises from convictions for criminal sexual conduct and unlawful imprisonment following a violent assault. The complainant testified that she met defendant in early 2018 while working as a waitress. Defendant, a regular customer, repeatedly left his phone number for her. The complainant is the mother of a three-year-old daughter, SK, and a seven-year-old son, KK, and worked multiple jobs to support her children. The complainant and defendant began a relationship and, in August 2018, moved into a two-bedroom apartment. Although the parties ended their romantic relationship in December 2018, they continued to reside together. The complainant shared one bedroom with her two children.

On the evening of January 21, 2019, the complainant and defendant were engaged in an argument while the complainant's children were asleep. The argument awakened the complainant's daughter, prompting the complainant to tend to her. According to the complainant, defendant then entered the children's room, forcibly grabbed her, and made a vulgar statement. Although the complainant's son remained asleep, her daughter witnessed the altercation.

Defendant allegedly picked up the complainant, carried her into his bedroom, and threw her onto the bed, with the daughter following. The complainant attempted to flee but was forcibly restrained by defendant, who pulled on her clothing and hair. The altercation escalated when defendant placed the complainant in a chokehold, impairing her ability to breathe. Fearing for her life, the complainant bit defendant and managed to free herself momentarily by kicking him. During the struggle, the complainant's daughter was present and visibly distressed. Defendant also forcefully manipulated the complainant's injured hand, causing her pain, and continued to physically restrain her.

The complainant testified that defendant restrained her by holding her wrists with one hand while pulling down his pants with the other. She observed that defendant attempted to force his partially erect penis into her mouth, using his hand to pry her mouth open. The complainant bit defendant's hand in an attempt to resist. She managed to free her arms briefly and scratched defendant, but he again restrained her and attempted to force her mouth open by covering her nose. Defendant inserted his penis into the complainant's mouth, and she responded by biting him. Throughout the incident, the complainant's daughter was present and attempted to intervene by hitting defendant with a plastic hanger. The complainant was screaming in an effort to wake her son and to call for help, while repeatedly telling defendant to stop. The complainant stated that defendant possessed a machete and that she had previously observed what appeared to be the handle of a firearm in his waistband, leading her to fear for her and her children's lives.

The complainant's son eventually awoke and observed the scene from the doorway. The complainant urged her son to seek help from a neighbor and to call 9-1-1. Defendant then threatened to kill the complainant and her daughter if the son attempted to leave. The son remained in the doorway. The complainant managed to temporarily push defendant off and attempted to escape, but defendant prevented her from leaving and reiterated his threats against her children, causing her to cease resisting.

The complainant testified that defendant then proceeded to sexually penetrate her in the presence of her son. Defendant had already removed the complainant's pants and underwear before getting on top of her. Initially, the complainant was on her back and attempted to resist by striking defendant, causing him to bleed; defendant then smeared blood on the complainant's face and mouth. Defendant subsequently turned the complainant onto her stomach, impairing her ability to resist further. The complainant testified that she stopped resisting out of fear for her children's safety, believing that continued resistance would result in harm to them. Defendant penetrated the complainant vaginally. The complainant continued to ask defendant to stop and never consented to intercourse that evening. She testified that the sexual act ended when defendant became flaccid and did not ejaculate. Although she acknowledged prior consensual sexual activity with defendant, she stated that no such activity had occurred since their separation.

After the assault, the complainant indicated her intention to contact law enforcement. Defendant responded with a profane statement. The complainant was unable to call the police immediately because defendant had destroyed her phone during the incident. The complainant's daughter was on the floor crying, while her son stood nearby in distress. The complainant took her children to their bedroom and waited until defendant departed the apartment. She subsequently called 9-1-1 using defendant's phone, which he had left behind.

Meridian Township Police Officer Antonio Trevino testified that he responded to the scene and interviewed the complainant, who recounted the events of the evening. The complainant reported that defendant carried her from the children's bedroom to another bedroom, pinned her on the bed, and sexually penetrated her without her consent. She also stated that she attempted to resist by striking and head-butting defendant. Officer Trevino observed that the complainant's phone had been shattered.

According to the testimony of both the victim and officer Trevino, the victim did not wish to seek medical treatment right away because she did not want to leave her children and was concerned about making sure that someone could watch her children. After approximately an hour, one of the victim's friends came to watch the children. The victim subsequently went to the hospital. The victim did not initially wish to press charges against defendant.

Defendant was arrested in his vehicle, where the police found a BB gun that looked much like a handgun, as well as a machete.

Michelle Gates, an emergency room nurse and sexual assault nurse examiner (SANE nurse), conducted a SANE examination on the victim at approximately 5:30 a.m. on January 22, 2019, after the victim arrived at the emergency room following the assault.[1] Before conducting the physical examination, Gates obtained a patient history and description of the incident from the victim. Gates explained that this history is important because it guides her assessment, medical treatment, and medical diagnosis of the patient. The medical record and report completed by Gates during the victim's SANE examination was admitted into evidence. A portion of the report containing the victim's description of the assault was read into the record at trial. In relevant part, that statement provided:

> He came and sat on the bed next to me and grabbed my crotch really hard and said "This pussy is mine." I told him to let go of me, but he wouldn't, and just did it harder. And I was yelling at him to stop doing that in front of my daughter. I told him to stop touching me, to get the fuck out of the room. He refused to leave. And then he picked me up and started carrying me to his bedroom. I bit him really hard twice on upper arm slash forearm.
>
> He threw me on the bed, got on top of me, and held me down by both of my wrists. He tried to hold both wrists with one hand. When he did that I was able to free my right hand and I hit him twice in the nose. His nose started bleeding. He took his hand and wiped the blood from his nose and wiped blood all over me, and purposefully got blood in my mouth. While still on top of me I kneed him. He held my wrist really hard, pulled my pants and his pants down, and penetrated me, clarified vagina with penis. While he was holding me down I was screaming at the top of my lungs to get help.

The SANE examination report indicated that the victim also reported anal contact and penetration with defendant's penis and denied any oral contact between the victim and defendant's

[1] Gates testified at trial as an expert in sexual assault examination and forensic evidence collection.

genitals. The victim testified that she started "blacking out" during the SANE exam. She also received a shot and medications that included medication for potential viral exposure.

Defendant testified in his own defense. He testified that he and the victim watched a movie on the night in question. However, defendant stated that he "didn't actually watch any of it," and "[t]hat's when she had requested that I perform oral sex on her." He believed this oral sex was consensual.

Later, at some point that night or in the middle of the night, defendant and the victim had an altercation in the kitchen. Defendant was suspicious about the victim wanting to be alone at home for the weekend, and she accused him of looking through her phone. He also expressed a desire to break up with the victim. According to defendant, the victim subsequently hit him in the nose with her forearm or palm and then punched him in the face 20 to 25 times. Defendant began bleeding heavily, but he indicated that he did not fight back or defend himself. He decided to leave the apartment, and the victim jumped on his back and continued to claw, punch, and kick him. Defendant walked to the bedroom and "shook her off" onto the bed. The victim then hit him another 15 to 20 times in the face. Defendant attempted to leave, but the victim "latched" onto his leg, clawed his eyes, punched him in the groin, and bit his thumb. When defendant finally left the apartment, the victim screamed loudly. Defendant eventually decided to sleep in his truck, after which the police arrived. He claimed that the machete and BB gun had been in his truck for over a month.

The jury found defendant guilty as previously stated. This appeal followed.

II. ANONYMOUS JURY

Defendant first argues that his right to due process was violated because the trial court only referred to potential jurors by number, rather than by name, during the jury selection process. Defendant contends that the trial court thus impaneled an anonymous jury and thereby undermined the presumption of innocence to which he was entitled.

A. ISSUE PRESERVATION AND STANDARD OF REVIEW

Generally, "[f]or an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court." *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Here, defendant concedes, consistent with the record in this case, that there was no objection at trial to the use of numbers rather than names for referring to the jurors during the jury selection process. This issue is therefore unpreserved. *Id.*; *People v Hanks*, 276 Mich App 91, 92; 740 NW2d 530 (2007) (finding that a challenge to referring to jurors by number was not preserved when there was no objection to this procedure in the trial court).

The trial court's decision to refer to jurors by number rather than by name is a decision concerning the conduct of voir dire, which this Court ordinarily reviews for an abuse of discretion. *People v Williams*, 241 Mich App 519, 522; 616 NW2d 710 (2000). However, when the issue is not preserved for appeal, this Court's review is for plain error affecting substantial rights. *Hanks*, 276 Mich App at 92.

To demonstrate plain error, a defendant has the burden to show (1) error, (2) that was clear or obvious, (3) and that affected substantial rights by affecting the outcome of the trial court proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). If all three showings are satisfied, reversal is only justified if the plain error "resulted in the conviction of an actually innocent defendant" or "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id*. at 763-764 (quotation marks and citation omitted; alteration in original).

B. ANALYSIS

In *Williams*, 241 Mich App at 522-523, this Court succinctly explained the relevant legal framework for an appellate challenge based on an allegedly "anonymous jury":

> An "anonymous jury" is one in which certain information is withheld from the parties, presumably for the safety of the jurors or to prevent harassment by the public. The withholding of information from parties was first used in federal courts, primarily as a protection against dangerous individuals. Use of this procedure in state courts began in the past decade. The courts have recognized that the use of an "anonymous jury" may promote the safety of prospective jurors, but at a potential expense to two interests of the defendant: (1) the defendant's interest in being able to conduct a meaningful examination of the jury and (2) the defendant's interest in maintaining the presumption of innocence. *In order to successfully challenge the use of an "anonymous jury," the record must reflect that the parties have had information withheld from them, thus preventing meaningful voir dire, or that the presumption of innocence has been compromised*. [citations omitted; emphasis added.]

The defendant in *Williams* argued that the trial court violated his right to due process by impaneling an "anonymous jury" because the trial court referred to jurors by number instead of by name. *Id*. at 522. This Court held that under the facts of that case, the defendant's right to due process was not violated by using juror numbers instead of names at trial. *Id*. at 525.

First, this Court concluded that because the practice of impaneling a truly anonymous jury involved withholding "certain biographical information about potential jurors" from *the parties* and there was no evidence in the record that any juror information was *actually* withheld from the parties, the record did "not support the conclusion that an 'anonymous jury,' in the strict sense of the term, was impaneled." *Id*. at 523 (citation and some quotation marks omitted). Instead, the names of the jurors were merely replaced by numbers when referring to the jurors, and the jurors thus "were not 'anonymous' except in the most literal sense; that is, their names were not read into the record." *Id*. (citation and some quotation marks omitted).

Moreover, this Court reasoned, the defendant had "admitted on the record that he had access to the jurors' biographical information, as contained in the juror questionnaires," and "the voir dire conducted by both parties demonstrates that that information was not withheld from the parties," so there was "nothing to indicate that defendant's ability to effectively examine the venire was compromised in any way." *Id*. at 523-524. There was also nothing in the record to indicate that the presumption of innocence was undermined by the use of numbers because there was "no

suggestion that jurors understood the use of numbers rather than names to be anything out of the ordinary" and "no suggestion that defendant's trial was being handled in a special way, with the resulting implication that he was generally dangerous or guilty as charged." *Id*. at 524.

Finally, although this Court declined to presume prejudice from the practice of using numbers rather than names to refer to jurors, it nonetheless cautioned that there was "the potential for prejudice arising from the use of anonymous juries" and that the "procedure should be employed only when jurors' safety or freedom from undue harassment is, in fact, an issue," along with the implementation of appropriate safeguards to assure a fair trial. *Id*. at 524-525.

This Court subsequently followed *Williams* in *Hanks*, stating that a "challenge to an 'anonymous jury' will only succeed where the record reflects that withholding information precluded meaningful voir dire or that the defendant's presumption of innocence was compromised." *Hanks*, 276 Mich App at 93. In *Hanks*, this Court read *Williams* to have adopted "a strict definition of 'anonymous jury,' where something more than just the jurors' names is withheld from the parties." *Id*. Reviewing the defendant's unpreserved anonymous jury challenge for plain error, this Court concluded that no plain error affecting substantial rights had occurred and reasoned as follows:

> In this case, the record reflects that the jurors were identified by numbers. However, the record also demonstrates that the juror questionnaires containing biographical information were provided to the parties, and that both parties conducted extensive voir dire. There is no indication that any of the jurors believed that there was any significance in the use of numbers instead of names. Further, defendant failed to demonstrate that the use of numbers prevented him from conducting meaningful voir dire or that his presumption of innocence was compromised. We conclude that the jury in this case was anonymous only in a literal sense, so none of the dangers of an "anonymous jury" was implicated. [*Id*. at 94 (citations omitted).]

The Court in *Hanks* urged "trial courts to advise the venire that any use of numbers in lieu of jurors' names are simply for logistical purposes and they should not in any way consider it a negative against the defendant" and expressly stated that it was not persuaded that *Williams* was wrongly decided. *Id*. at 94-95.

Here, the trial court referred to potential jurors by number rather than by name during jury selection. As previously noted, defendant concedes that he did not object to this procedure at trial. Both the trial judge and the prosecutor emphasized during voir dire that defendant was presumed innocent at the outset of trial. Defense counsel reinforced this presumption and questioned potential jurors to ensure their understanding of it. Defense counsel's questions further demonstrated knowledge of the jurors' occupations, specifically inquiring about two potential jurors being nurses and another being a minister.

Defendant's appellate argument that his due process rights were violated by the alleged use of an "anonymous jury" rests solely on the trial court's practice of referring to potential jurors by numbers instead of names. Defendant does not assert that he was denied access to any other specific biographical information about the potential jurors. Nor does he contend that the potential

jurors failed to complete juror questionnaires or that he was denied access to those questionnaires. To the contrary, the nature of defense counsel's voir dire questioning suggests that defendant possessed this information. The record is devoid of any indication that referring to jurors by number, rather than by name, was anything other than a logistical or administrative convenience. Where the record reflects that jurors were referred to by number, rather than by name, solely for logistical convenience, and where no biographical or other material information was withheld from the parties so as to impair meaningful voir dire or undermine the presumption of innocence, the jury cannot be considered anonymous in the strict sense, and no due process violation occurs. *Hanks*, 276 Mich App at 93-94. Defendant has not demonstrated that he was tried by an "anonymous jury" as that term is defined under Michigan law, nor has he shown that any information was withheld that impeded meaningful voir dire or compromised the presumption of innocence. Accordingly, defendant has not established plain error. *Id*. at 92-94; see also *Williams*, 241 Mich App at 522-525. This Court is bound by *Williams* and *Hanks*, both published decisions of this Court issued after November 1, 1990. MCR 7.215(J)(1) and we are not persuaded that *Williams* or *Hanks* were wrongly decided.

III. HEARSAY

Defendant next argues that it was plain error to admit the report of SANE nurse Gates repeating the victim's account of the incident because it was improper hearsay that unfairly bolstered the victim's testimony and did not fall within the medical treatment exception to the hearsay rule.

A. ISSUE PRESERVATION AND STANDARD OF REVIEW

"To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal." *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Here, as defendant admits on appeal, there was no objection to the evidence now challenged on appeal. This issue is therefore unpreserved. *Id*. Our review is thus for plain error affecting substantial rights. *People v Thorpe*, 504 Mich 230, 252; 934 NW2d 693 (2019).

B. ANALYSIS

Unless an exception applies under the Michigan Rules of Evidence, hearsay is inadmissible. MRE 802. Hearsay is a statement made by a declarant outside the current court proceeding and that is offered into evidence to prove the truth of the matter asserted. MRE 801. Under the medical treatment exception to the prohibition against hearsay, as this exception existed at the time of trial, "[s]tatements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as

reasonably necessary to such diagnosis and treatment" are "not excluded by the hearsay rule, even though the declarant is available as a witness[.]" MRE 803(4).[2]

In *People v Mahone*, 294 Mich App 208, 214-215; 816 NW2d 436 (2011), this Court held that statements made by a victim to a nurse conducting a sexual assault examination may properly be considered to have been made for purposes of medical treatment and may thus be admissible under MRE 803(4). This Court explained:

> Statements made for the purpose of medical treatment are admissible pursuant to MRE 803(4) if they were reasonably necessary for diagnosis and treatment and if the declarant had a self-interested motivation to be truthful in order to receive proper medical care. This is true irrespective of whether the declarant sustained any immediately apparent physical injury. *Particularly in cases of sexual assault, in which the injuries might be latent, such as contracting sexually transmitted diseases or psychological in nature, and thus not necessarily physically manifested at all, a victim's complete history and a recitation of the totality of the circumstances of the assault are properly considered to be statements made for medical treatment*. Thus, statements the victim made to the nurse were all properly admissible pursuant to MRE 803(4). [*Id*. (citations omitted; emphasis added).]

Defendant correctly notes that statements made to a medical provider regarding an alleged sexual assault are not per se admissible. In *People v Shaw*, 315 Mich App 668, 675; 892 NW2d 15 (2016), this Court determined that a complainant's statements to a physician were not admissible under the medical treatment exception to the hearsay rule in that case. There, the physician's examination of the complainant occurred seven years after the last alleged incident of sexual abuse, the complainant was referred to the physician by law enforcement rather than seeking out gynecological services independently, and the complainant had received gynecological care from a different physician, who did not testify at trial, during the intervening years. This Court concluded that, under those unique factual circumstances, the complainant's statements describing the alleged abuse were not made for the purpose of medical treatment. *Id*.

Here, the complainant was subjected to a violent sexual assault during the night and was examined by SANE nurse Gates early the next morning after presenting to the emergency department. The record reflects that the complainant received medication to address potential exposure to disease resulting from the assault. Although there was a brief delay before the complainant sought hospital care, the delay was attributable to her efforts to secure care for her children during her absence. Under these circumstances, the record supports that the complainant sought medical treatment, and her statements to medical personnel fall within the medical treatment exception to hearsay. See *Mahone*, 294 Mich App at 214-215. These facts are readily distinguishable from *Shaw*, where the examination did not occur until many years after the alleged abuse. Accordingly, defendant has not demonstrated plain error. See *Carines*, 460 Mich at 763.

[2] The rules of evidence have since been restyled, but the current version of the medical treatment exception to the hearsay rule appears to be substantively identical.

Defendant further contends, in the alternative, that trial counsel was ineffective for failing to object to the admission of this testimony. To warrant relief based on ineffective assistance of counsel, a defendant must establish that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that, but for counsel's error, there is a reasonable probability that the outcome would have been different. *People v Abcumby-Blair*, 335 Mich App 210, 228; 966 NW2d 437 (2020). Because the challenged testimony was admissible under MRE 803(4), an objection on this basis would have been futile. Counsel is not ineffective for failing to raise meritless objections. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

IV. UNLAWFUL IMPRISONMENT

Next, defendant asserts that there was insufficient evidence to support his unlawful imprisonment conviction.

A. ISSUE PRESERVATION AND STANDARD OF REVIEW

No specific procedural steps are necessary for a criminal defendant to preserve an appellate challenge to the sufficiency of the evidence. *People v Cain*, 238 Mich App 95, 116-117; 605 NW2d 28 (1999). A challenge to the sufficiency of the evidence is a question of law that is reviewed de novo. *People v Harverson*, 291 Mich App 171, 176-177; 804 NW2d 757 (2010). "To determine whether sufficient evidence has been presented, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v McMillan*, 213 Mich App 134, 139; 539 NW2d 553 (1995).

B. ANALYSIS

Defendant was charged with unlawful imprisonment, in violation of MCL 750.349b, for allegedly restraining the victim in order to commit CSC I and/or interfering with electronic communication.

MCL 750.349b provides in relevant part:

> (1) A person commits the crime of unlawful imprisonment if he or she knowingly restrains another person under any of the following circumstances:
>
> * * *
>
> (c) The person was restrained to facilitate the commission of another felony or to facilitate flight after commission of another felony.
>
> * * *
>
> (3) As used in this section:
>
> (a) "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. The restraint does not have to exist for any

particular length of time and may be related or incidental to the commission of other criminal acts.

* * *

(4) This section does not prohibit the person from being charged with, convicted of, or sentenced for any other violation of law that is committed by that person while violating this section.

Defendant contends that the evidence presented at trial was insufficient to establish that he knowingly restrained the victim to facilitate the commission of criminal sexual conduct. The record reflects that defendant picked up the victim, carried her to another room, and held her down while removing his pants. Defendant then sexually assaulted the victim by penetrating her mouth and vagina with his penis. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find beyond a reasonable doubt that defendant committed the offense of unlawful imprisonment. See *McMillan*, 213 Mich App at 139. Accordingly, defendant has failed to demonstrate that the evidence was insufficient to support his conviction for unlawful imprisonment.

V. UNANIMITY INSTRUCTION

Next, defendant argues that his right to a properly instructed and unanimous jury was violated because the trial court did not provide a specific unanimity instruction regarding whether defendant penetrated the victim's vagina with his penis or his tongue.

A. ISSUE PRESERVATION AND STANDARD OF REVIEW

"A party must object or request a given jury instruction to preserve the error for review." *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000). Defendant concedes that this claim of error was not raised below. Defendant's jury instruction issue is thus unpreserved. *Id*. We review this unpreserved claim of error for plain error affecting substantial rights. *Carines*, 460 Mich at 764.

B. ANALYSIS

Michigan's constitution protects a criminal defendant's right to a unanimous jury verdict. *People v Cooks*, 446 Mich 503, 510-511; 521 NW2d 275 (1994), citing Const 1963, art 1, § 14; see also MCR 6.410(B). Accordingly, the trial court must properly instruct the jury on the unanimity requirement. *People v Chelmicki*, 305 Mich App 58, 67-68; 850 NW2d 612 (2014). "[I]f alternative acts allegedly committed by defendant are presented by the state as evidence of the actus reus element of the charged offense, a general instruction to the jury that its decision must be unanimous will be adequate unless 1) the alternative acts are materially distinct (where the acts themselves are conceptually distinct or where either party has offered materially distinct proofs regarding one of the alternatives), or 2) there is reason to believe the jurors might be confused or disagree about the factual basis of defendant's guilt." *Cooks*, 446 Mich at 524.

Defendant was convicted of CSC-I, in violation of MCL 750.520b. That statute provides in relevant part:

(1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:

* * *

(c) Sexual penetration occurs under circumstances involving the commission of any other felony.

* * *

(e) The actor is 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.

(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.

(*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.

(*iii*) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute this threat. As used in this subdivision, "to retaliate" includes threats of physical punishment, kidnapping, or extortion. [MCL 750.520b.]

Defendant argues on appeal that the jury was required to be unanimous as to the specific type of sexual penetration that occurred. Under MCL 750.520a(r), "sexual penetration" is defined as "sexual intercourse, cunnilingus, fellatio, anal 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." "[W]hen a statute sets forth alternative means of committing a single offense, and those means do not constitute separate and distinct offenses, jury unanimity is not required as to the particular alternative." *Chelmicki*, 305 Mich App at 68. Further, where the acts in question are not materially distinct, or there is no reason to believe that jurors may be confused or in disagreement about the factual basis for the defendant's guilt, a general unanimity instruction is sufficient and does not infringe upon the defendant's right to a unanimous verdict. *Cooks*, 446 Mich at 530.[3]

[3] In a brief response to the dissent on this issue, we note the record does not support the existence of two distinct criminal events, as alleged consensual sexual activity between these adults does not constitute a crime. Thus, contrary to the findings of the dissent, there was no reason to believe that

Here, prior to closing arguments, the prosecution moved to amend the theory on the first-degree criminal sexual conduct (CSC-I) charge to include an alternative—penetration of the victim's vagina with defendant's tongue, in addition to the original theory of penetration with his penis, in light of the defense presented. The trial court granted the motion. The jury was instructed that its verdict in a criminal case must be unanimous, and that all jurors must agree in order to return a verdict.

As to defendant's argument, the relevant statutes require only that "sexual penetration" occurred, which may be proven in multiple ways. MCL 750.520b; MCL 750.520a(r). This case did not involve allegations of multiple, distinct incidents of nonconsensual sexual penetration. Rather, the evidence established that defendant was accused of committing a single, violent sexual assault, and the prosecution was required to prove sexual penetration as an element of the single CSC-I charge. Jury unanimity as to the specific means of penetration was not required under these circumstances. *Chelmicki*, 305 Mich App at 68. Furthermore, the only evidence of penetration by defendant's tongue was his own testimony regarding *consensual* oral sex. Therefore, there was no evidence of two materially distinct acts, nor any reason to believe the jurors were confused or in disagreement regarding the factual basis for defendant's guilt. Accordingly, the general unanimity instruction did not deprive defendant of his right to a unanimous verdict. *Cooks*, 446 Mich at 530. No plain error requiring reversal occurred. *Carines*, 460 Mich at 763-764.

Defendant also contends, in the alternative, that trial counsel was ineffective for failing to request a specific unanimity instruction as to the type of penetration. However, given the evidence presented, defendant cannot show a reasonable probability of a different outcome had such an instruction been given. Accordingly, defendant cannot establish that he was denied the effective assistance of counsel. *Abcumby-Blair*, 335 Mich App at 228.

Affirmed.

/s/ Stephen L. Borrello
/s/ Mariam S. Bazzi

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the jurors might have been confused or disagreed about the factual basis for defendant's guilt. *Cooks*, 446 Mich at 524. While we express no opinion as to whether the prosecution was required to amend its charging theory to reference penetration by defendant's tongue as an alternative means, the necessity for such an amendment appears doubtful in light of the evidence presented. Additionally, the crime here is penetration, not the means by which it occurred. In any event, because the record does not reflect juror confusion or disagreement as to the factual basis for guilt, defendant's claim of error predicated on the absence of a specific unanimity instruction regarding the type of penetration is unavailing. The dissent's reliance on hypothetical scenarios is thus inapposite to the circumstances of this case.

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 09, 2026 9:25 AM
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Before: BORRELLO, P.J., and BAZZI and LIEVENSE, JJ.

LIEVENSE, J. (*concurring in part, dissenting in part*).

I agree with Parts II-IV of the majority opinion and would therefore affirm defendant's unlawful imprisonment conviction.

I disagree, however, with Part V of the majority opinion that addresses defendant's claim that his constitutional rights were violated because the trial court did not provide a specific unanimity instruction for his first-degree criminal sexual conduct (CSC-I) charge. Because I believe the trial court erred in not giving such an instruction, and that decision was plain error that affected defendant's substantial rights, I dissent. I would reverse the judgment on the CSC-I charge and remand the case for a new trial on that count.

I. RELEVANT BACKGROUND

CSC-I can be proven in several ways. MCL 750.520b. To prove CSC-I in this case, the prosecution initially proceeded under two theories, both involving penile penetration of the complainant, that either: (1) occurred under circumstances involving a felony (here, telephone interference or unlawful imprisonment), MCL 750.520b(1)(c), and/or (2) caused personal injury to the complainant and force or coercion was used to accomplish sexual penetration, MCL 750.520b(1)(f). "Force or coercion" is further defined in the statute. MCL 750.520b(1)(f)(*i*)-(*iii*).

With respect to penetration, the prosecution presented evidence in its case in chief of penile penetration by defendant under the relevant attendant circumstances required by the CSC-I statute, as described in the majority opinion. At the time, the prosecution was aware that defendant claimed he and the complainant had engaged in consensual cunnilingus earlier the same night

because defendant had reported that to police the night of the incident and because defendant's attorney had referenced consensual cunnilingus in his opening statement. Even so, the prosecution did not present any evidence from the complainant about cunnilingus or that any of the attendant circumstances for CSC-I occurred during cunnilingus. Near the end of its case, however, the prosecution said it was moving to amend the CSC-I charge to include cunnilingus as a basis to support the CSC-I charge based on the defense's opening statement and that it had updated the jury instructions to reflect that change. The court, however, deferred decision on the issue since there had not been any testimony on the topic.

Defendant later testified that, among other things, he performed consensual cunnilingus on the complainant on the night in question, there was no penile penetration later that night as she had testified to, and he acknowledged that they had a physical altercation later that night, at least about an hour after the cunnilingus, though the exact timing was unclear.

Then, after the close of proofs, and right before closing arguments, the prosecution again made an oral motion to amend the information to add cunnilingus as an alternative basis to support a conviction for CSC-I. Apparently, a different judge had presided during the complainant's testimony, because the judge responded that "I'm handicapped since I didn't hear [the complainant's] testimony." Ultimately, the judge granted the motion even though there was no evidence of any of the required attendant circumstances to support a CSC-I conviction during the cunnilingus, as neither the complainant nor defendant had mentioned any. No one mentioned on the record whether the prosecutor's requested change impacted the jury instructions.

The parties proceeded to closing arguments, during which the prosecution made the following statements:

> [Defendant] is charged with two things, Criminal Sexual Conduct in the First Degree and Unlawful Imprisonment. Now, you heard me towards the end here request an amendment to Count I, and that's true. When we first read off those charges, there were multiple theories for this.
>
> Either that the defendant engaged in a sexual act that involved entry into her vagina by his penis under circumstances involving crimes of Telephone Interference and . . . or Unlawful Imprisonment. Or under circumstances that caused personal injury, which includes mental anguish. You're gonna hear about the elements from the Judge. You're gonna have a copy of them while you're back there deliberating.

The prosecution then explained that it had decided the factual basis for the charges was penile penetration before it realized defense counsel was going to argue consensual cunnilingus occurred, then it stated, in light of the testimony, "All right, fine. So we're amending." It went on to argue:

> There's two possible theories you can find. Those same two for [penile penetration], or [cunnilingus]. If that's the story [defendant]'s going to try and go with, fine. It's not true at all, but sure.
>
> To be clear, you do not all need to agree on whether [penile penetration] or [cunnilingus occurred]. You do not all need to agree whether he committed that

> without her consent and the other crime happened, or there was personal injury. You just all need to agree that one of these scenarios happened. You could all be split about which one that is, and you still have to come back with guilty. You do not need to agree on the theory of the crime. Only if each of you agree that the crime happened based on whatever theory you believe.

The trial adjourned for the day after closing arguments. The next morning, the trial court asked the parties if they had "[a]ny matters before we bring the jury in," but did not ask if there were any objections to the instructions. The trial court then instructed the jury, including regarding the two actus reus theories outlined in the prosecution's closing argument, but did not include a specific unanimity instruction that would have required the jury to be unanimous as to what act, penile penetration or cunnilingus, constituted the penetration as required for CSC-I.

II. ANALYSIS

In this context, and in response to defendant's argument on appeal, the majority opinion concludes that no specific unanimity instruction was required because sexual penetration can be proven in multiple ways, the case "did not involve allegations of multiple, distinct incidents of nonconsensual sexual penetration," and instead the evidence established that defendant was "accused of a single, violent sexual assault." Thus, the majority concludes, jury unanimity as to the means of penetration was not required here, citing *People v Chelmicki*, 305 Mich App 58, 68; 850 NW2d 612 (2014).

Alternative acts are materially distinct "where the acts themselves are conceptually distinct or where either party has offered materially distinct proofs regarding one of the alternatives." *People v Cooks*, 446 Mich 503, 524; 521 NW2d 275 (1994). "The critical inquiry is whether either party has presented evidence that materially distinguishes any of the alleged multiple acts from the others." *Id*. at 512.

It is true, as the majority states, that there was no evidence of distinct incidents of "nonconsensual" sexual penetration, but that is because there was no evidence of "nonconsensual" cunnilingus at all. Meanwhile, it is untrue that there was no evidence of two distinct incidents of penetration: the first was consensual cunnilingus, testified to by the defendant, and the second was nonconsensual penile penetration occurring with attendant circumstances relevant to CSC-I, testified to by the complainant.

Thus, the facts of this case are like *People v Parish*, unpublished per curiam of the Court of Appeals, issued October 17, 2024 (Docket No. 363307), p 4, a CSC case where this Court found, relying on *Cooks*, 446 Mich at 512-513, 530, that a specific unanimity instruction was required because there was evidence that some sexual acts were consensual and there was only evidence that one sexual act involved force or coercion. *Parish* is not binding authority,[1] but CSC cases are fact specific, and I believe its reasoning and discussion of *Cooks* should apply here. And this case is unlike those cases where a sexual assault involves different types of penetration that occur over

[1] "Unpublished authorities are not binding on this Court but may be considered as persuasive authority." *People v Swenor*, 336 Mich App 550, 563 n 7; 971 NW2d 33 (2021).

a continuous course of conduct. See, e.g., *Cooks*, 446 Mich at 522 (holding that there is no specific unanimity instruction requirement under "two circumstances—when the two offenses are so closely connected in time that they form part of one transaction or when the offense consists of a continuous course of conduct"); *People v Bailey*, 310 Mich App 703, 719; 873 NW2d 855 (2015). Indeed, the case the majority cites, *Chelmicki*, 305 Mich App at 68-69, involved one continuous course of unlawful imprisonment using different types of restraint, meaning it does not guide the result here.

Despite the testimony that distinct acts allegedly occurred under materially different circumstances, the prosecutor amended the CSC-I charge to include cunnilingus, and then argued to the jury that they did not need to agree on what act constituted "penetration" for purposes of CSC-I. But on appeal, even the prosecution now concedes that a specific unanimity instruction was required in these circumstances, and that a new trial would normally be warranted as a result, because the instances of sexual penetration were materially distinct: one instance was alleged consensual cunnilingus, and the other was penile penetration. To be sure, a specific unanimity instruction is not always required just because there is more than one type of penetration. *Cooks*, 446 Mich at -513 ("[A] specific unanimity instruction is not required in all cases in which more than one act is presented as evidence of the actus reus of a single criminal offense"). But I agree with the prosecution and the defense that one was required here.

Having conceded error, the prosecution argues that, despite the mistake in not giving a specific unanimity instruction, this Court should affirm the conviction because defendant cannot show he was prejudiced. It argues that defendant cannot show any juror would have voted to convict him based on cunnilingus, and that the complainant's testimony of forceful penile penetration was corroborated, meaning he would have been convicted anyway. This Court reviews unpreserved instructional error for "plain error affecting defendant's substantial rights."[2] *People v Waclawski*, 286 Mich App 634, 678-679; 780 NW2d 321 (2009). "To establish plain error, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 N.W.2d 130, 138 (1999). And while the prosecution does not reference the applicable legal standard, in essence it argues that the instructional error did not affect defendant's substantial rights.

The problem with the prosecution's argument, however, is that it told the jury that it could rely on defendant's admission of consensual cunnilingus to satisfy that element of CSC-I and

[2] Plain error review does not apply to unpreserved instructional error if a defendant expressly approved of the instructions, meaning he waived his challenge to the jury instructions. *People v Miller*, 326 Mich App 719, 726; 929 NW2d 821 (2019), citing *People v Carter*, 462 Mich 206, 215-216; 597 NW2d 130 (1999). Here, I see no record evidence that the defense approved of the jury instructions after the court granted the prosecution's motion to amend the information, thus, the plain error standard applies. If defendant somehow did waive his challenge to the jury instructions, the standard for ineffective assistance of counsel would apply, which is what the prosecution argues, and the issue would be reviewed for mistakes apparent from the record because no *Ginther* hearing was held. *Miller*, 326 Mich App at 726.

convict defendant, and that the jury did not need to be unanimous on that point. And the prosecution did so even though there was no evidence of any required attendant circumstances that would support cunnilingus constituting CSC-I. I cannot assume that the jury ignored the prosecutor's explicit argument.

Instead, it is just as plausible that the jury relied on it and at least some, if not all, decided that the consensual cunnilingus satisfied the penetration element of CSC-I, believed the defendant that no penile penetration occurred, but also found that defendant's actions during the physical altercation satisfied the other elements for CSC-I. And, since there was no specific unanimity instruction, if some members of the jury did so the trial court deprived defendant of his right to a unanimous verdict. "[W]hen the prosecution offers evidence of multiple acts by a defendant, each of which would satisfy the actus reus element of a single charged offense, the trial court is required to instruct the jury that it must unanimously agree on the same specific act if the acts are materially distinct or if there is reason to believe the jurors may be confused or disagree about the factual basis of the defendant's guilt." *People v Gadomski*, 232 Mich App 24, 30; 592 NW2d 75 (1998), citing *Cooks*, 446 Mich at 530.

The prosecution's closing argument highlights why a specific unanimity instruction was required, and why the lack of one impacted defendant's substantial rights. The prosecution presented two theories describing materially distinct acts to satisfy the actus reus component of the single CSC-I charge involved in this case. The first theory—nonconsensual penile penetration that occurred under circumstances that also involved telephone interference or unlawful imprisonment and/or caused personal injury to the complainant—was supported by the testimony from the complainant and her son. The second theory—consensual cunnilingus—had no supporting evidence to link it with the aggravating circumstances under MCL 750.520b(1)(c) or (f). Yet the prosecution told the jury that did not matter, even while it now concedes on appeal that convicting based on consensual cunnilingus would be a "stretch." While a trial court is not required to instruct the jury that it must reach a unanimous verdict when the facts support multiple aggravated circumstances underlying a single CSC-I charge, *Gadomski*, 232 Mich App at 31-32, the same is not true where, as here, defendant offered "materially distinct proofs regarding . . . the alleged acts." *Cooks*, 446 Mich at 528.

For these reasons, I respectfully dissent from Part V of the majority opinion.

/s/ Andrew J. Lievense