STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARLOS MARCELINO GONZALEZ,

Defendant-Appellant.

UNPUBLISHED
September 18, 2007

No. 269631
Macomb Circuit Court
LC No. 2005-003996-FC

Before: O'Connell, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree criminal sexual conduct, MCL 750.520b(1)(f), second-degree criminal sexual conduct, MCL 750.520c(1)(c), and three counts of assault with intent to commit criminal sexual penetration, MCL 750.520g(1). He was sentenced to concurrent prison terms of 15 to 30 years for the first-degree CSC conviction, 5 to 15 years for the second-degree CSC conviction, and five to ten years for each of the assault convictions. He appeals as of right. We affirm.

Defendant first argues that the trial court erred by filing to give the cautionary instruction concerning drug addict testimony, CJI2d 5.7. Defendant did not request this instruction at trial and, moreover, he expressed satisfaction with the instructions given by the trial court. Therefore, the issue is deemed waived on appeal. *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004). However, defendant bootstraps an ineffective assistance of counsel claim relative to CJI2d 5.7; therefore, we shall examine the matter.

CJI2d 5.7 is to be used only where the uncorroborated testimony of an addict-informer is the only evidence linking the defendant to the alleged offense. *People v Atkins*, 397 Mich 163; 243 NW2d 292 (1976); *People v McKenzie*, 206 Mich App 425, 432; 522 NW2d 661 (1994); CJI2d 5.7 (use note). In this case, we cannot conclude that the evidence reflected the presence of *uncorroborated* testimony of *addict-informers*, and thus defense counsel was not ineffective for failing to make a meritless request for the instruction. See *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997). Moreover, given the trial court's jury instruction on factors to consider in evaluating the credibility of witnesses, the vigorous attack on the credibility of the prosecution's witnesses by defendant, and the evidence presented at trial, we find no prejudice to defendant assuming deficient performance by counsel. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

Defendant next argues that the trial court erred in scoring the sentencing guidelines. At sentencing, defense counsel stated that "we agree with the scoring of the SIR" and "we agree with the guideline range." Because defense counsel affirmatively approved the scoring of the sentencing guidelines, as well as the guidelines range, any error was waived. See *People v Dobek*, 274 Mich App 58, 65-66; 732 NW2d 546 (2007).

Next, defendant argues that the evidence was insufficient to support his convictions. We review claims of insufficient evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses. *Id.* at 514-515. Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

Defendant argues that the evidence was insufficient to identify him as the perpetrator, or to show that any sexual act was not consensual. We disagree. The complainant identified defendant as her attacker. Additionally, defendant gave a statement to the police in which he admitted engaging in sexual activity with the complainant, but claimed that it was consensual. Thus, the evidence was sufficient to identify defendant as the person involved in the sexual activity with the complainant. Furthermore, the complainant testified that she told defendant to stop when he touched her breast, but he continued and forcibly penetrated her with his penis. A witness in the house testified that she observed the complainant crying and struggling with defendant, who appeared to be hurting her. Defendant's conduct scared the witness to the point that she locked herself in the bedroom. This evidence was sufficient to enable the jury to find that the sexual activity was not consensual. Although defendant argues that the complainant's testimony was not credible, the credibility of the testimony was for the trier of fact to resolve, and this Court will not resolve it anew. *Wolfe*, *supra* at 514-515. Accordingly, there was sufficient evidence to support defendant's convictions.

Next, defendant argues that the trial court abused its discretion by admitting photographs of the complainant depicting injuries that she allegedly received during the offense. Again, defendant agreed below that the photographs could be admitted; therefore, the issue was waived. *Dobek*, *supra* at 65-66. Moreover, there was no error. Photographs are admissible if they are substantially necessary to show material facts or conditions. *People v Anderson*, 209 Mich App 527, 536; 531 NW2d 780 (1995). However, the trial court should exclude those that could lead the jury to abdicate its truth-finding function and convict on passion alone. *Id.*

Defendant was charged with first-degree CSC by engaging in sexual penetration accomplished by force or coercion and causing personal injury. MCL 750.520b(1)(f). The photos were offered to show that the complainant was physically injured during the incident, and they were also relevant to the issue whether force was used to commit the offense. Contrary to defendant's argument, the nurse's note that was admitted at trial did not indicate that the bruises

depicted in the photos were self-inflicted. Rather, the note only indicated that the complainant caused some abrasions by touching the bruises.

Further, the record discloses that defense counsel used the photos to establish that some of the complainant's injuries were not caused by defendant and to elicit testimony that it could not be stated with any reasonable degree of medical certainty that other injuries depicted in the photos were caused by defendant. Thus, the probative value of the photos was not substantially outweighed by the danger of unfair prejudice. See MRE 403.

For these reasons, defendant has failed to show that the admission of the photographs constituted error. Absent any basis for concluding that the photographs were inadmissible, defense counsel was not ineffective for failing to object to their admission. *Torres, supra* at 425.

Next, defendant argues that the prosecutor's misconduct denied him a fair trial. This issue is not preserved because defendant did not object to the prosecutor's conduct at trial. Therefore, we review this issue for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763.

Defendant first argues that the prosecutor improperly failed to disclose the results of defendant's DNA testing, contrary to *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). There is no merit to this issue.

A criminal defendant has a due process right to obtain exculpatory evidence possessed by the prosecutor if it would raise a reasonable doubt about the defendant's guilt. *People v Schumacher*, ___ Mich App ___; ___ NW2d ___, issued June 28, 2007 (Docket No. 267624), slip op at 6, citing *Brady, supra* at 87; *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005). But in order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *Cox, supra* at 448.

In this case, the prosecutor did not possess and suppress the DNA results. They were simply not available yet. Moreover, there is no basis for concluding that the DNA results were material because identity was not an issue. Thus, defendant has failed to show either a plain error affecting his substantial rights, *Carines*, *supra* at 763, or that defense counsel was ineffective for failing to obtain the DNA results, *Torres, supra* at 425. Reversal is unwarranted.

Defendant further argues that the prosecutor engaged in misconduct by failing to disclose other evidence, such as the complainant's telephone records and the results of her drug testing, as well as videotapes of witness interviews, contrary to *Arizona v Youngblood*, 488 US 51, 58; 109 S Ct 333; 102 L Ed 2d 281 (1988). In *Youngblood*, *supra* at 57-58, the Court held that the government's failure to preserve potentially useful evidence violates a criminal defendant's due process rights if the defendant can show bad faith on the part of the government. In this case, however, the record discloses that the complainant's telephone records and drug test results were preserved and admitted into evidence at trial. Thus, there is no merit to this issue. Although defendant argues that police videotapes of the witness interviews would have disclosed

inconsistencies in their statements, he has not established that such videotapes actually exist. Again, defendant has failed to show either a plain error or ineffective assistance of counsel in connection with this issue.

Finally, defendant argues that the prosecutor engaged in misconduct by referring to him as a drug dealer in closing argument. The prosecutor's statement was factually supported by testimony at trial identifying defendant as a source for drugs. *People v Lee*, 212 Mich App 228, 255; 537 NW2d 233 (1995). Although it would have been improper for the prosecutor to suggest to the jury that it could convict defendant because of his character, rather than specific conduct, *People v Quinn*, 194 Mich App 250, 253-254; 486 NW2d 139 (1992); *People v Jones*, 48 Mich App 334, 343; 210 NW2d 396 (1973), the prosecutor's comment was not directed at defendant's character. Rather, the prosecutor was attempting to explain why the complainant was reluctant to call the police. Viewed in context, the prosecutor's remark did not constitute plain error.

Affirmed.

/s/ Peter D. O' Connell
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald