STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 17, 2007
v	No. 269345 Macomb Circuit Court
JAMEL ANDRE STOKES, Defendant-Appellant.	LC No. 2005-001295-FH

Before: Bandstra, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(d), and fourth-degree criminal sexual conduct, MCL 750.520e(1)(a). He was sentenced as an habitual offender, second offense, MCL 769.10, to concurrent prison terms of 87 months to 30 years each for the third-degree CSC convictions, and 23 months to 4 years for the fourth-degree CSC conviction. He appeals as of right. We affirm.

I

Defendant's convictions arise from the sexual assault of his 13-year-old next-door neighbor in February 2005. The victim was home alone because school was cancelled. She was outside shoveling snow when she encountered defendant, who asked to borrow her shovel. After returning the shovel, defendant made sexually suggestive comments and invited the victim back to his home to smoke marijuana. At his home, defendant engaged the minor in sexual intercourse and other sexual acts. The victim told her best friend of the sexual encounter, and ultimately, the victim's mother learned of the acts and called police.

At trial, defendant denied ever having met the victim. He testified that he was at work the entire day of the incident, except when he left with another coworker to pick up a car. In support of his defense, he presented alibi witnesses to support his testimony, including his wife and co-workers.

II

Defendant first argues that there was insufficient evidence to sustain his convictions. We disagree. 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; 489 NW2d 748, amended 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

As applicable to this case, the elements of third-degree CSC are that the defendant engaged in sexual penetration with another person, and the other person was at least 13 and under 16 years of age. MCL 750.520d(1)(a). "Sexual penetration" is defined to mean "sexual intercourse, . . . or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body. . . ." MCL 750.520a(p). A person is guilty of fourth-degree CSC if the person engages in sexual contact with another person and that other person is at least 13 years of age but less than 16 years of age, and the actor is five or more years older than that other person. MCL 750.520e(1)(a). MCL 750.520a(o) provides that "sexual contact" includes "the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purposes of sexual arousal or gratification." See *People v Piper*, 223 Mich App 642, 647; 567 NW2d 483 (1997). "Intimate parts" includes "the primary genital area." MCL 750.520a(d).

Defendant does not challenge the individual elements of the offenses. Rather, he argues that the evidence was insufficient because the prosecution witnesses were not credible and there was no physical evidence to corroborate the victim's testimony. Defendant's argument requires this Court to ignore the victim's testimony and resolve credibility issues anew on appeal. It is well established that absent compelling circumstances, which are not present here, the credibility of witnesses is for the jury to determine. See *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998), and *Wolfe*, *supra* at 514. Furthermore, contrary to what defendant argues, there is no requirement that physical evidence or eyewitnesses corroborate the victim's testimony. Rather, a victim's uncorroborated testimony is sufficient to convict a defendant of CSC. MCL 750.520h; *Lemmon*, *supra* at 632 n 6.

Viewed in a light most favorable to the prosecution, the victim's testimony was sufficient to establish that defendant engaged in both sexual penetration and sexual contact with her, contrary to MCL 750.520d(1)(a) and MCL 750e(1)(a).[1] The "sexual penetration" element of the two third-degree CSC convictions was satisfied by the victim's detailed testimony that defendant digitally penetrated her vagina, and then put his penis into her vagina as the two engaged in sexual intercourse. The "sexual contact" element for the fourth-degree CSC conviction was satisfied by the victim's testimony that defendant rubbed her vaginal area over her jeans.

[1] There is no dispute that the victim was 13 years old and defendant was more than five years older than her at the time of the incident.

In addition to the victim's testimony, defendant's parole officer testified that defendant admitted to having sexual intercourse with the victim, and defendant's description to his parole officer was essentially identical to the victim's version of the incident. Further, defendant's coworker, Thompson, testified that defendant left work on the afternoon of the incident and later returned with a video game. Defendant could not provide any explanation of how the victim knew about him picking up a video game that he took back to work, and denied giving her that information. The victim also provided an accurate description of the inside of defendant's house, although defendant denied ever meeting her.

From this evidence, the jury could reasonably conclude that defendant sexually assaulted the victim. Although defendant presented an alibi, it was up to the jury to determine whether that account was credible. *Nowack, supra*. The evidence was sufficient to sustain defendant's convictions of two counts of third-degree CSC and one count of fourth-degree CSC.

III

Defendant argues, in the alternative, that his convictions are contrary to the great weight of the evidence. We disagree. Because defendant failed to preserve this issue by raising it in a motion for a new trial, we review the issue for plain error affecting substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004); *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003).

In evaluating whether a verdict is against the great weight of the evidence, the question is whether the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand. *Lemmon, supra* at 627. A verdict may be vacated only when it "does not find reasonable support in the evidence, but is more likely to be attributed to causes outside the record such as passion, prejudice, sympathy, or some extraneous influence." *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993) (citation omitted). Conflicting testimony and questions regarding the credibility of witnesses are not sufficient grounds for granting a new trial. *Lemmon, supra* at 643. Indeed, "unless it can be said that directly contradictory testimony was so far impeached that it 'was deprived of all probative value or that the jury could not believe it,' or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination." *Id*. at 645-646 (citation omitted).

For the reasons discussed in part II, the verdict is not against the great weight of the evidence. The evidence does not clearly preponderate so heavily against the verdict that a miscarriage of justice would result if the verdict was allowed to stand. *Id.* at 627. Consequently, this claim does not warrant reversal.

IV

Defendant further argues that the trial court erred when it admitted the statements that he allegedly made to a police officer and his parole officer. Defendant argues that the statements

were involuntary because, although he was in custody when he made the statements, he had not been advised of his *Miranda*[2] rights.

Because defendant did not move to suppress his statement to the police officer or object to its admissibility at trial, we review this claim for plain error affecting substantial rights. *Kimble*, *supra*. Although defendant did not file a pretrial motion to suppress his statement to his parole officer, the matter was raised and argued on the first day of trial, and the trial court ruled on the issue. Therefore, this issue is preserved. Whether a defendant's statement was knowing, intelligent, and voluntary is a question of law that a court evaluates under the totality of the circumstances. *People v Cheatham*, 453 Mich 1, 27, 44; 551 NW2d 355 (1996). The trial court's findings of fact will not be disturbed unless they are clearly erroneous. *People v Sexton (After Remand)*, 461 Mich 746, 751-752; 609 NW2d 822 (2000).

Statements of a defendant made during a custodial interrogation are inadmissible unless the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999). However, "[i]t is well established that *Miranda* warnings need be given only in situations involving custodial interrogation." *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). A custodial interrogation is a questioning initiated by law enforcement officers after the accused has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Id*. Interrogation "refers to express questioning and to any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect." *People v Anderson*, 209 Mich App 527, 532-533; 531 NW2d 780 (1995) (citation omitted).

The first statement that defendant challenges occurred while the arresting officer was booking him at the police station. The arresting officer testified that he overheard defendant mutter, "He could not believe a five-minute mistake was going to ruin the rest of his life." There is no dispute that defendant had not received his *Miranda* warnings before he made this statement. But there is no indication that the officer asked defendant any questions or performed any other action to induce the statement. Thus, defendant's statement was not the product of custodial interrogation, but was volunteered. Statements made voluntarily by suspects in custody do not fall within the purview of *Miranda*, and are admissible. *People v Raper*, 222 Mich App 475, 479; 563 NW2d 709 (1997). Consequently, there was no plain error in admitting this statement. *Kimble*, *supra*.

Defendant also challenges his statement to his parole officer. Again, there is no dispute that defendant's parole officer did not advise defendant of his *Miranda* rights. But the *Miranda* requirement is inapplicable here because defendant's parole officer was not a police officer conducting a custodial interrogation. "A person who is not a police officer and is not acting in concert with or at the request of the police is not required to give *Miranda* warnings before eliciting a statement." *Anderson*, *supra* at 533. At the preliminary examination and at trial, the parole officer indicated that at the time of defendant's statement, he was not a police officer, but

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

was acting independently from the police, that he went to visit defendant as part of his job as a parole officer, and that his only reason for speaking to defendant was to advise him of parole violation charges, to advise him of his right to a preliminary hearing on those charges, and to determine if he would agree to waive the hearing. He further testified that the police were not aware that he was interviewing defendant. Consequently, the trial court did not err in admitting the statement.

V

Defendant argues that he was denied his constitutional right to a speedy trial because the prosecution delayed his trial for 251 days. We disagree.

Because defendant did not formally demand a speedy trial, this issue is not preserved. *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999). Therefore, this Court reviews this unpreserved issue for plain error affecting defendant's substantial rights. *Kimble*, *supra.*

A criminal defendant has a constitutional and statutory right to a speedy trial. "In determining whether a defendant has been denied a speedy trial, four factors must be balanced: (1) the length of the delay, (2) the reasons for the delay, (3) whether the defendant asserted his right to a speedy trial, and (4) prejudice to the defendant from the delay." *People v Mackle*, 241 Mich App 583, 602; 617 NW2d 339 (2000) (citations omitted).

The first factor, the length of delay, does not favor a finding of a speedy trial violation. The delay period commences at the arrest of the defendant. *People v Williams*, 475 Mich 245, 261; 716 NW2d 208 (2006). Defendant was arrested on March 9, 2005, and trial commenced on January 6, 2006. The total time between defendant's arrest and trial was less than 18 months. "A delay that is under eighteen months requires a defendant to prove that the defendant suffered prejudice." *Cain*, *supra* at 112.

With respect to the second factor, in assessing the reasons for the delay, this Court must examine and attribute each period of delay to either the prosecution or the defendant. See *People v Gilmore*, 222 Mich App 442, 460-461; 564 NW2d 158 (1997). Despite defendant's conclusory assertion that a delay of 251 days is chargeable to the prosecution, the record discloses that the largest delay was attributable to the defense.

As previously indicated, defendant was arrested on March 9, 2005. On April 25, 2005, defendant discharged his attorney. On May 31, 2005, the case was remanded to district court for a preliminary examination. Defendant obtained new counsel on July 7, 2005. On that same date, the preliminary examination was held. In his brief, defendant concedes that "[t]he period between April 25, 2005, and July 7, 2005, was acknowledged to be charged to the Defendant." Defendant was arraigned in circuit court on August 8, 2005. Defendant and the prosecutor thereafter stipulated to adjourn the scheduled trial date of October 26, 2005, because "the parties have not yet received the report on hair and semen evidence submitted to the Michigan State Police laboratory," and "defense attorney requests more time to file motion(s) in this matter." Trial was rescheduled for November 30, 2005. On November 30, 2005, defense counsel failed to appear, causing an additional adjournment. On December 6, 2005, defense counsel filed a motion to withdraw as counsel, and defendant was appointed new counsel on December 12, 2005. Ultimately, a pretrial hearing was held on December 19, 2005, and trial commenced on

January 6, 2006. Although there were reasons for additional delays, those periods were not significant. Under these circumstances, this factor weighs against defendant.

With respect to the third factor, the assertion of the speedy trial right, this Court looks at when the defendant asserted the right and when trial took place in relation to the assertion. See *Cain, supra* at 113-114. As previously indicated, defendant failed to timely assert his right to a speedy trial, which "weighs against a finding that he was denied a speedy trial." *People v Wickham,* 200 Mich App 106, 112; 503 NW2d 701 (1993).

With regard to the fourth factor, there are two types of prejudice: prejudice to the person and prejudice to the defense. *Gilmore, supra* at 461-462. The latter prejudice is the more crucial in assessing a speedy trial claim. *Williams, supra* at 264. Defendant does not sufficiently argue that his incarceration during the delay prejudiced his person. *Gilmore, supra* at 462 (prejudice to the person consists of the deprivation of a defendant's civil liberties). Defendant states that he suffered from "anxiety, depression, stress and mental anguish" because of his confinement in jail. But anxiety alone is insufficient to establish a violation of the right to a speedy trial. *Gilmore, supra.*

Prejudice to the defense must meaningfully impair a defendant's ability to defend against the charges against him in such a manner that the outcome of the proceeding will likely be affected. *People v Adams,* 232 Mich App 128, 134-135; 591 NW2d 44 (1998). Here, there is no indication that the delay adversely affected defendant's ability to defend the charges. Defendant notes that he "suffered the natural loss of the recollection of events as a result of the lengthy delay," and lost "valuable witnesses . . . who would have testified that he engaged in no criminal behavior." But general allegations of prejudice caused by delay, such as the unspecified loss of evidence or memory, are insufficient to show that his defense was affected. *Gilmore, supra*; *People v Cooper,* 166 Mich App 638, 655; 421 NW2d 177 (1987). Furthermore, defendant has not identified what witnesses were lost, or what specific beneficial testimony they could have provided. In short, defendant has failed to show that any potential witness favorable to the defense or that other exculpatory evidence was lost due to the delay in bringing defendant to trial. Consequently, defendant's claim of prejudice to his defense lacks merit. In sum, when balancing the relevant factors, defendant's right to a speedy trial was not violated.

VI

Defendant also argues that a new trial is required because defense counsel was ineffective. Defendant alternatively argues that remand is necessary to enable him to develop this claim. We disagree. Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand),* 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger,* 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

Defendant argues that defense counsel was ineffective for failing to file a pretrial motion to suppress his statements to the police and his parole officer. Although defense counsel did not file a pretrial motion to suppress defendant's statement to his parole officer, the matter was raised and addressed by the trial court on the first day of trial. Moreover, in light of our conclusion in part IV that both statements were admissible, a pretrial motion to suppress would have been futile. Consequently, defendant cannot establish a claim of ineffective assistance of counsel. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (counsel is not required to advocate a meritless position).

We reject defendant's argument that defense counsel was ineffective for failing to object to references that he was on parole. References to defendant's parole status were made in connection with his parole officer's testimony regarding the statements that defendant made to him concerning this crime. As indicated previously, the matter was raised and addressed by the trial court. Therefore, it is highly probable that had defense counsel objected during trial, it would have been futile. In addition, as a result of defense counsel's arguments, the trial court prohibited the parole officer from introducing evidence of the crimes for which defendant was placed on parole, and limited the parole officer's testimony to those statements defendant made in response to the alleged parole violation, i.e., the crimes at issue in this case. The court also instructed the jury regarding the proper use of evidence that defendant had been convicted of a crime in the past for which he was not on trial. Under these circumstances and given the weight of the evidence produced at trial, no reasonable likelihood exists that defendant would not have been convicted but for trial counsel's failure to object. *Effinger*, *supra*.

Defendant further argues that defense counsel was ineffective for failing to object to testimony that defendant "ceased talking to the police and asked for an attorney." During the prosecutor's examination of the arresting officer, the following exchange occurred:

> *Q*. And what did you do then?
>
> *A*. We took him to the interview room in the booking area, read him his - - I read him his rights from a Clinton Township from. *Upon reading his rights, he stated he wanted an attorney and the interview was ceased at that point.*
>
> *Q*. And did you do anything else with respect to the investigation or did it end there?
>
> *A*. I was done with it. I had nothing else to do with it.

Defendant correctly notes that testimony concerning a defendant's post-arrest, post-*Miranda* silence is inadmissible. *People v Crump*, 216 Mich App 210, 214; 549 NW2d 36 (1996). However, the response was an unsolicited answer to an open-ended question about what occurred next in the investigation, and not patently designed to elicit the improper testimony. Although defense counsel did not object to the testimony, defendant has not overcome the presumption that defense counsel's failure to object was reasonable trial strategy. Given the brief and isolated reference, defense counsel may have reasonably determined that an objection would have drawn more attention to the improper testimony. *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, even if counsel was ultimately mistaken, nor will it assess

counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 444-445; 597 NW2d 843 (1999). Moreover, given the weight of the evidence produced at trial, no reasonable likelihood exists that the brief reference affected the outcome of the case. *Effinger*, *supra*.

For these reasons, we reject defendant's claim that defense counsel was ineffective and are not persuaded that a remand is necessary.

Affirmed.

/s/ Richard A. Bandstra
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood