STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 8, 2009
v QUINSHUN EARL WHITE, Defendant-Appellant.	No. 284711 Calhoun Circuit Court LC No. 2007-003446-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v BERNARD CLIFTON, Defendant-Appellant.	No. 284712 Calhoun Circuit Court LC No. 2007-003456-FC

Before: Talbot, P.J., and Wilder and MJ Kelly, JJ.

PER CURIAM.

In Docket No. 284711, defendant Quinshun Earl White appeals as of right his convictions for kidnapping, MCL 750.349; first-degree criminal sexual conduct (CSC-1), MCL 750.520b; and possession of a firearm during the commission of a felony, MCL 750.227b. In Docket No. 284712, defendant Bernard Clifton appeals as of right his convictions for kidnapping, MCL 750.349; felonious assault, MCL 750.82; and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. White was sentenced to 15 to 30 years' imprisonment for his kidnapping conviction, to 15 to 30 years' imprisonment for his CSC-1 conviction, and to two years' imprisonment for his felony-firearm conviction. Clifton was sentenced to 20 to 40 years' imprisonment for his kidnapping conviction, to two to four years' imprisonment for his assault conviction, and to two years' imprisonment for each of his felony-firearm convictions. We affirm.

In Docket No. 284711, White raises four issues on appeal, and in the first, he argues that the prosecution improperly elicited testimony regarding White's post-*Miranda*[1] request for counsel. White failed to preserve this issue with an objection in the trial court, so we will not reverse his conviction unless we find plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A defendant's silence at the time of arrest and after receiving *Miranda* warnings is not admissible at trial. *People v Boyd*, 470 Mich 363, 374-375; 682 NW2d 459 (2004). However, the record here suggests that the prosecutor was not inquiring into White's post-arrest, post-*Miranda* silence or request for counsel, but was merely asking if White indicated whether he understood his *Miranda* rights after they were provided to him. White relies on the following testimony of a police witness during the prosecutor's direct examination:

> *Q*. Anything else that you would have done in regard to this incident[?]
>
> *A*. . . . I read him his *Miranda* rights at the police station.
>
> *Q*. That would be Quinshun White?
>
> *A*. Yes.
>
> *Q*. And you read him his *Miranda* rights, and did he respond to you in any fashion as to whether he had an understanding of what those rights were?
>
> *A*. He said that he wanted a lawyer.
>
> *Q*. And that was the end of anything at that point?
>
> *A*. Yes.

The prosecutor did not expand upon White's silence or request counsel during the remainder of the police witness' examination. The prosecutor did not raise the issue of White's silence or request for counsel during closing arguments, and never implied White's guilt from his silence or request for counsel. Further, White never testified, so the testimony regarding silence was not used for impeachment purposes. See *People v Dennis*, 464 Mich 567, 582-583; 628 NW2d 502 (2001). Additionally, the trial court instructed the jury that defendants do not have to testify, and that they are presumed innocent. In this case, the single question and somewhat unresponsive testimony is analogous to the inadvertent reference in *Dennis, supra* at 572-583, not the improper impeachment issue addressed in *Doyle v Ohio*, 426 US 610, 619; 96 S Ct 2240; 49 L Ed 2d 91 (1976). And, there was substantial evidence to support the jury's verdict without the improper testimony. One victim, Eden Graver, provided consistent and compelling testimony at trial of White's guilt. A trier of fact may convict based on the credibility of the victim's testimony without further corroboration. See *People v Jones*, 193 Mich App 551, 554; 484 NW2d 688 (1992), rev'd on other grounds 443 Mich 88 (1993). Further, the testimony of

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

two coconspirators corroborated the kidnapping allegations. White has not demonstrated that the trial's outcome or its fairness was affected by the vague and momentary reference to his request for counsel; thus, he has not established the existence of plain error affecting his substantial rights. *Carines*, *supra* at 763-764.

Additionally, White asserts that trial counsel's failure to object to the challenged testimony amounted to ineffective assistance of counsel.[2] To sustain a claim of ineffective assistance of counsel, a defendant must prove that trial counsel's "performance was deficient" and that deficiency "prejudiced the defense." *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). While trial counsel could have objected to the testimony that he elicited, doing so would have drawn attention to the challenged comment; "there are times when it is better not to object and draw attention to an improper comment." *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995). Counsel's performance did not fall below an objective standard of reasonableness, and defendant is not entitled to relief on this claim. *Strickland*, *supra* at 690-691; *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003), rev'd on other gds 481 F3d 315 (CA 6, 2007).

Next on appeal, White contends that the prosecutor engaged in misconduct by commenting upon White's failure to produce evidence at trial. White failed to raise this contention at trial, so it is not preserved; moreover, it lacks merit.

"The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice resulted)." *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). We evaluate the prosecution's comments in light of trial counsel's arguments and the evidence admitted at trial. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). It is axiomatic that a prosecutor may not comment on a defendant's failure to testify or present evidence, i.e., the prosecution may not attempt to shift the burden of proof onto the defendant. *Abraham*, *supra* at 273. White challenges the prosecutor's comment that "there is no evidence that was presented by the defense." After reviewing all of the prosecutor's comments and arguments and evaluating them in light of trial counsel's arguments and the evidence, we find that this out-of-context comment appears to have been inadvertent. The comment was made when the prosecutor was responding to an assertion by Clifton's counsel, made during opening statements that there was a lack of physical evidence in this case. Reviewed in context, the prosecutor was not making a burden-shifting argument. *People v Ackerman*, 257 Mich App 434, 452; 669 NW2d 818 (2003). And, even though improper, the trial court instructed the jury that defendants do not have to testify, and that they are presumed innocent. There was no error where the curative instruction prevented any prejudicial effect. *Id.* at 448-449.

[2] White raised three claims of ineffective assistance of counsel; however, he did not move for a hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), or a new trial. Thus, his claims are not preserved. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

We also reject White's unpreserved claim of ineffective assistance of counsel regarding trial counsel's failure to object to the aforementioned comment by the prosecution. On this record, there was no reasonable probability that the outcome at trial would have been different but for trial counsel's alleged errors in failing to object. As discussed previously, there was substantial evidence to support the jury's verdict. White cannot show that trial counsel's conduct "fell below an objective standard of reasonableness under prevailing professional norms," or that there was a reasonable probability that but for counsel's actions, he would have been acquitted. *Strickland, supra* at 690-691.

White next claims on appeal that the trial court erred when it instructed the jury on the kidnapping count, where he essentially argues that he was deprived his right to a unanimous verdict on the kidnapping count because some of the jurors may not have found him guilty of kidnapping both victims, but may have found him guilty only of kidnapping Graver while other jurors found him guilty of only kidnapping the other victim, Robert Maggard. White failed to object at trial; thus, our review is limited to plain error affecting substantial rights. *Carines, supra* at 763-764.

"A jury verdict must be unanimous." MCR 6.410(B). "Unless waived by a defendant, the right to a jury trial includes the right to a unanimous verdict." *People v Yarger*, 193 Mich App 532, 537; 485 NW2d 119 (1992). Our Supreme Court provided the following explanation regarding the necessity of a unanimity instruction:

> The critical inquiry is whether either party has presented evidence that *materially* distinguishes any of the alleged multiple acts from the others. In other words, where materially identical evidence is presented with respect to each act, and there is no juror confusion, a general unanimity instruction will suffice. [*People v Cooks*, 446 Mich 503, 512-513; 521 NW2d 275 (1994) (footnote omitted).]
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> ***
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> [W]hen the state 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. When neither of these factors is present, as in the case at bar, a general instruction to the jury that its verdict must be unanimous does not deprive the defendant of his right to a unanimous verdict. [*Id.* at 530.]

In the instant case, White was tried on one count of kidnapping, where it was alleged that he knowingly restrained Graver and Maggard with the intent to hold a person in involuntary servitude contrary to MCL 750.349(1)(e). The trial court provided the following jury instruction regarding that count:

> [I]n count one, it's alleged that defendant [White] committed the crime of kidnapping, and again, to prove that charge, the prosecution must prove each of the following elements beyond a reasonable doubt: first, that the defendant knowingly restrained another person, and again, restrained means to restrict the

> person's movements or to confine the person so as to interfere with that person's liberty without the person's consent or without legal authority. And again, the restraint does not have [to] exist for any particular length of time, and it may be related or incidental to the commission of other . . . criminal acts.
>
> And second, as it relates to Mr. White, by doing so, the defendant must have intended to do, to hold that person in involuntary servitude.

The trial court also provided a general unanimity instruction to the jury.

In this case, a specific unanimity instruction should have been provided regarding the kidnapping count, given that the prosecution presented evidence of multiple acts by White and Clifton, each of which would have satisfied the *actus reus* element, i.e., knowingly restraining another person, of the charged offense of kidnapping. *Id.* at 530. Here, defendants went to the apartment of Graver and Maggard, taking Graver to another apartment and telling Maggard to get money to satisfy a drug debt. The element of knowingly restraining was demonstrated with respect to Graver by defendants' keeping her at one apartment, and then moving her to another apartment. With respect to Maggard, the evidence demonstrated that defendants restricted his movements by holding Graver and demanding that he must immediately satisfy his debt, presumably to ensure her release. Further, there was evidence that defendants later held Graver and Maggard concurrently, where defendants allegedly beat both victims, forced both victims to participate in a cruel variation of the game "Simon says," threatened them at gunpoint, and ordered Graver to perform fellatio on one coconspirator while Maggard was forced to watch. After Maggard ran from Clifton's gunshots, there was additional evidence that defendants held Graver, and forced her to perform fellatio on the other coconspirator. In this case, a possibility exists that the jurors were not unanimous, e.g. six jurors were convinced that White kidnapped Graver, while the other six jurors were convinced that White kidnapped Maggard. *Yarger, supra* at 537; *People v Pottruff*, 116 Mich App 367, 375; 323 NW2d 402 (1982).

Generally, "where either of the two separate charges could have been proved at trial, the case must be remanded to allow the prosecutor to retry the defendant on one charge, or both separately." *People v Quinn*, 219 Mich App 571, 576; 557 NW2d 151 (1996). However, reversal is not warranted on the facts of this case because the error did not affect White's substantial rights. While the verdict form was not included in the lower court file, the trial court read the jury's verdict into the record, providing in relevant part that "as to count one, 'we find the defendant [White] guilty of kidnapping Eden Graver and Robert Maggard.'" There is no indication that the jurors disagreed about the factual basis of White's guilt for the crime of kidnapping. It can be deduced clearly from the jury's verdict that White was convicted of kidnapping, because the jury unanimously concluded that he knowingly restrained both Graver and Maggard. See *People v Rand*, 397 Mich 638, 643; 247 NW2d 508 (1976), amended 399 Mich 1040 (1977) ("a jury verdict is not void for uncertainty if the jury's intent can be clearly deduced by reference to the pleadings, the court's charge, and the entire record").

The kidnapping offense was part of a continuous course of conduct, and White did not present separate defenses with respect to the charged offenses. Rather, his defense focused on undermining the credibility of Graver and the two coconspirators, and shifting culpability to one of the coconspirators. Further, the instant case is distinct from cases in which this Court reversed on grounds of failure by the trial court to provide a unanimity instruction. See *Yarger, supra*;

Potruff, supra. On this record, we conclude that the outcome of White's case was not affected by the trial court's failure to provide a specific unanimity instruction; thus, reversal is not required based on this unpreserved issue. *Carines, supra* at 763-764.

Additionally, we reject White's unpreserved, cursory claim of ineffective assistance of counsel regarding this issue. "The failure to brief the merits of an allegation of error constitutes an abandonment of the issue." *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004). Nevertheless, as discussed previously, the failure to provide a specific unanimity instruction was not outcome determinative where the record reflects that the jury unanimously found that defendant kidnapped both victims. There was no reasonable probability that the outcome at trial would have been different but for trial counsel's alleged errors in failing to request specific unanimity instructions.

White's final allegation of error is that the trial court erred by imposing attorney fees without considering his ability to pay. We disagree.

In *People v Jackson*, 483 Mich 271, 290; 769 NW2d 630 (2009), the Michigan Supreme Court held that the trial court is not constitutionally required to determine a defendant's ability to pay attorney fees before imposing this requirement as an element of sentencing. Rather, defendant is not eligible to challenge the attorney fee on the basis of indigency until such time as enforcement proceedings to collect payment of the fee have been undertaken. *Id.* at 292-293.

In Docket No. 284712, Clifton asserts that one of his convictions of felony-firearm should be dismissed, because the jury found him not guilty of its predicate felony offense. Clifton essentially argues that the jury rendered an inconsistent verdict. This unpreserved assertion lacks merit. A jury may render illogical or inconsistent verdicts and may convict a defendant of felony-firearm while acquitting him of the underlying felony. *People v Wakeford*, 418 Mich 95, 109 n 13; 341 NW2d 68 (1983); *People v Lewis*, 415 Mich 443, 452-453; 330 NW2d 16 (1982). Because a jury may render illogical or inconsistent verdicts, *Wakeford, supra* at 109 n 13, we conclude that Clifton failed to establish plain error affecting his substantial rights. *Carines, supra* at 763-764.

Affirmed.

/s/ Michael J. Talbot
/s/ Kurtis T. Wilder
/s/ Michael J. Kelly