

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRUCE ADRIAN COXTON,

Defendant-Appellant.

UNPUBLISHED

February 28, 1997

No. 189562

Washtenaw Circuit Court

LC No. 94-002457-FC

Before: Murphy, P.J., and Markey and A.A. Monton,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct causing personal injury, MCL 750.520b(1)(f); MSA 28.788(2)(1)(f). He was sentenced to two concurrent terms of ten to twenty-five years in prison. He appeals as of right, and we affirm.

Defendant first argues that he was denied a fair trial because the victim's credibility was unfairly bolstered by the testimony of the victim's friend and the police detective. Because defendant did not object at trial to the victim's friend's testimony, only defendant's challenge to the testimony of the police detective is preserved for our review. *People v Mooney*, 216 Mich App 367, 378; 549 NW2d 65 (1996). The police detective testified that victims of violent crimes often do not give information in a chronological manner. We do not find that the trial court abused its discretion in admitting this testimony because it was elicited only after the prosecution laid a proper foundation about the police detective's qualifications and did not include the detective's opinion about this particular victim's credibility or truthfulness. See *People v McAlister* 203 Mich App 495, 505; 513 NW2d 431 (1994). Moreover, the testimony was necessary because defense counsel had attempted to impeach the victim's credibility on cross-examination by pointing out the discrepancies in her recollection of the events on the night in question.

Second, defendant argues that the trial court abused its discretion by not granting his motion for discovery of the privileged records of the victim's therapist and by not admitting evidence of the victim's

* Circuit judge, sitting on the Court of Appeals by assignment.

prior inconsistent statement at trial. Defendant alleges that the victim omitted to tell her therapist that defendant forced her to perform fellatio on him, one of the sexual acts that formed the basis of the charges against defendant. The trial court's decisions to preclude further discovery and to exclude the evidence at trial were proper because defendant's broad request did not establish a reasonable probability that the records contained information relevant to his defense. *People v Stanaway*, 446 Mich 643, 678-680; 521 NW2d 557 (1994).

Defendant's third argument is that reversal of his convictions is required because the prosecution improperly bolstered the victim's credibility by questioning her about her religious beliefs in front of the jury. Although no witness may be questioned in relation to his or her opinions on religion, MCL 600.1436; MSA 27A.1436, the victim in this case was merely being questioned about the details of the meetings she attended with two other witnesses in this case. Showing how the victim knew these two witnesses was not a fact extraneous to the trial proceeding such as when religious beliefs are injected by a party to prejudice the jury. Thus, the trial court did not abuse its discretion in admitting this testimony and defense counsel was not ineffective in not objecting to the testimony because this Court does not require counsel to make futile objections. *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995); *McAlister*, *supra*.

Fourth, defendant argues that he is entitled to a new trial because the trial judge repeatedly indicated that he could not hear what was being said in the courtroom and showed his prejudice against defendant by chastising and demeaning defense counsel. There were many instances in the record where other persons in the courtroom, including the prosecutor, court reporter and defense counsel, indicated that they could not hear what was being said. Further, the judge, like the other people who did not hear what a witness said, asked that the testimony be repeated. Thus, we find defendant's assertion that the trial judge could not perform his proper role because of a hearing impairment to be without merit.

Additionally, we have reviewed each of the six instances of alleged judicial misconduct cited by defendant and find that the trial judge's statements or rulings do not indicate prejudice against defendant. Instead, on the record before us, it appears that the trial judge was simply performing his role under MCL 768.29; MSA 28.1052 by ruling on objections and maintaining order in the courtroom. *People v Ullah*, 216 Mich App 669, 674; 550 NW2d 568 (1996). Moreover, at the end of the trial, the trial judge instructed the jury not to use his rulings during the proceeding as an indication of which party he favored.

Fifth, defendant argues that the trial court's order denying him discovery about the victim's acting career was erroneous because this case centered on the victim's credibility and the jury deserved to know whether she was playing a specific role in alleging the charges against defendant. A criminal defendant has no general right to discovery, but discovery will be ordered where the trial court, in its discretion, determines that the requested material is admissible into evidence and a failure of justice may result from its suppression. *People v Mack*, 218 Mich App 359, 361; 554 NW2d 324 (1996).

This case was not solely a credibility contest between defendant and the victim because of the other evidence against defendant, including the testimony of the friends, medical personnel, and two police officers who saw the victim the following day, as well as the physical evidence about which the forensic scientist testified. This testimony and evidence corroborated the victim's account of the criminal sexual conduct; thus, her acting experience would have made little, if any, difference in the outcome of defendant's trial and may have misled the jury. MRE 403. Additionally, we note that the trial court's order was confined to denying defendant's broad discovery request and did not limit defendant's cross-examination of the victim. *People v Graham*, 173 Mich App 473, 477; 434 NW2d 165 (1988). Therefore, we find that the trial court did not abuse its discretion in denying defendant's discovery request.

Next, defendant argues that reversal of his convictions is required because of the many instances where the prosecution during closing argument improperly appealed to the jury's personal prejudices or bolstered a witness's credibility. Even if defendant's allegations of error were preserved, none warrant reversal because the comments made by the prosecution in this case were not an attempt to highlight the victim's pregnancy to gain sympathy from the jury, but to show that defendant's theory at trial was unsound because a pregnant woman would have difficulty forcefully throwing a chair or rushing defendant as defendant had contended. Because these remarks addressed issues raised by defense counsel, they were proper. *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989).

Specifically, defendant objects to two statements by the prosecution that highlighted for the jury that the victim in this case was over five months pregnant at the time of the alleged criminal sexual conduct. We find both of these comments proper because a prosecutor is free to comment with respect to the evidence and all reasonable inferences that may be drawn from the evidence as it relates to its theory of the case. *People v McElhaney*, 215 Mich App 269, 284; 545 NW2d 18 (1996). The remaining three statements by the prosecution to which defendant objects concerned the victim's credibility as a witness. These, too, were proper remarks because a prosecutor may argue from the facts that a witness is not worthy of belief. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

Defendant's final argument, that the trial court erred in instructing the jury, is also unpreserved for our review. However, we note that this Court has stated that even where instructions to a jury are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Davis*, 216 Mich App 47, 54; 549 NW2d 1 (1996). Here, the jury was properly instructed regarding the law applicable to this case and there exists no harm to defendant's rights that rises to the level of manifest injustice. *People v Johnson*, 215 Mich App 658, 672-673; 547 NW2d 65 (1996).

Affirmed.

/s/ William B. Murphy
/s/ Jane E. Markey
/s/ Anthony A. Monton

