

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VINCENT EARL PRAZUCH,

Defendant-Appellant.

UNPUBLISHED

June 13, 1997

No. 182021

Macomb Circuit Court

LC No. 94-346-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS PRAZUCH,

Defendant-Appellant.

No. 182022

Macomb Circuit Court

LC No. 94-345-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SIDNEY LAMAR BURRELL,

Defendant-Appellant.

No. 183151

Macomb Circuit Court

LC No. 94-326-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEPHEN LAMAR MARKS,

Defendant-Appellant.

No. 185452

Macomb Circuit Court

LC No. 94-342-FC

Before: McDonald, P.J., and Reilly and O'Connell, JJ.

PER CURIAM.

In these consolidated appeals, defendants appeal as of right their convictions stemming from the rape of a fifteen-year-old girl. Defendants Vincent Prazuch and Sidney Burrell were each convicted of three counts of third-degree criminal sexual conduct, MCL 750.520d; MSA 28.788(4), and each sentenced to three concurrent terms of seven to fifteen years' imprisonment.¹ Defendant Thomas Prazuch was convicted of one count of third-degree criminal sexual conduct, MCL 750.520d; MSA 28.788(4), and was sentenced to a term of seven to fifteen years' imprisonment. Defendant Stephen Marks was convicted of three counts of third-degree criminal sexual conduct, MCL 750.520d; MSA 28.788(4), and was sentenced to three concurrent terms of five to fifteen years' imprisonment. Each appeals as of right. We affirm in each case, but remand in the cases of Vincent Prazuch (No. 182021) and Sidney Burrell (No. 183151) for clarification of their respective judgments of sentence.

Vincent Prazuch

Defendant Vincent Prazuch first claims that the verdicts were against the great weight of the evidence. A new trial may be granted where a verdict is against the great weight of the evidence. *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993). Determining whether a verdict is against the great weight of the evidence requires review of the whole body of proofs. *Id.* An objection going to the weight of the evidence can be raised only by a motion for new trial before the trial court. *People v Bradshaw*, 165 Mich App 562, 565; 419 NW2d 33 (1988). This Court reviews the denial of a motion for new trial under the abuse of discretion standard. *Herbert, supra*, p 477.

In the present case, we find no abuse of discretion. Defendant emphasizes the discrepancies between the complainant's testimony at trial and statements she made to the investigating officer at the time the incident was reported. While the complainant did offer testimony that was, to some extent, inconsistent with her prior statements, the question of the complainant's credibility was for the finder of fact to resolve. *People v Sharbnow*, 174 Mich App 94, 105; 435 NW2d 772 (1989). Further, the countervailing evidence presented by defendant in his defense was not so compelling as to render the jury's evaluation of the complainant's credibility indefensible. Thus, in light of the court's traditional

deference to the jury in matters of witness credibility, we cannot say that the trial court abused its discretion.

Some of the authority advanced by defendant in support of his contention that the verdicts were against the great weight of the evidence implicates the concept of the sufficiency of the evidence rather than the weight of the evidence. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). However, an appellant must identify his issues on appeal in his statement of questions involved. MCR 7.212(C)(5). The failure to do so waives the issue on appeal. *People v Yarbrough*, 183 Mich App 163, 165; 454 NW2d 419 (1990). Because defendant failed to allege the insufficiency of the evidence in his statement of questions involved, we deem this issue waived. However, were we to consider this issue, viewing the evidence in the light most favorable to the prosecution, *Wolf, supra*, we would agree with defendant's concession in his brief on appeal that the victim's testimony "standing alone could be sufficient to support a conviction."

Defendant next raises several allegations of error with respect to the scoring of the Sentencing Information Report (SIR). In *People v Mitchell*, ___ Mich ___; ___ NW2d ___ (Docket nos. 98984, 98985; issued 3/25/97) slip op pp 33-34, our Supreme Court revolutionized the review of scoring decisions, holding that allegations of error with respect to scoring "state[] a cognizable claim on appeal only where (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate." Considering the circumstances of the offense and the defendant, *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), we do not find the sentences imposed to be disproportionate. Therefore, pursuant to the limited review described by *Mitchell*, we find no sentencing error.

Defendant Vincent Prazuch's convictions and sentences are affirmed, but we remand to allow the trial court to clarify the judgment of sentence. See note 1.

Thomas Prazuch

Defendant Thomas Prazuch also assails the weight of the evidence supporting his conviction, and challenges the sufficiency of the evidence, as well. With respect to his challenge to the sufficiency of the evidence, the complainant testified as to all the necessary elements of the offense of which defendant was convicted, third-degree criminal sexual conduct. See MCL 750.720d; MSA 28.788(4). Viewing this evidence in the light most favorable to the prosecution, *Wolfe, supra*, this testimony was sufficient to sustain his conviction. With respect to defendant's claim that the verdict was against the great weight of the evidence, the credibility of the complainant was for the jury to determine. *Sharbnaw, supra*. We find no abuse of discretion in the trial court's denial of defendant's motion for new trial.

Defendant also brings a host of challenges to the scoring of the SIR. Because we find no abuse of discretion in the seven- to fifteen-year sentence imposed for defendant's conviction after considering the offense and the offender, *Milbourn, supra*, we conclude that defendant fails to assert a cognizable claim on appeal. *Mitchell, supra*.

Defendant Thomas Prazuch's conviction and sentence are affirmed.

Sidney Burrell

Defendant Sidney Burrell raises four issues on appeal. First, he claims he was denied the effective assistance of counsel where his attorney failed to request a *Walker*² hearing concerning the admission into evidence of a statement made by defendant to the police that was allegedly obtained in violation of *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602, 1612; 16 L Ed 2d 694 (1966). He further contends that defense counsel was ineffective in failing to move to sever his trial from that of his codefendants in light of the court's ruling to allow the admission into evidence of certain prior statements of his codefendants.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that but for counsel's error, the result of the proceeding would have been different. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). A defendant is presumed to have received the effective assistance of counsel and bears a heavy burden in proving otherwise. *People v Wilson*, 180 Mich App 12, 17; 446 NW2d 571 (1989).

Because defendant failed to move for a hearing on the issue of ineffective assistance of counsel pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), our review of this claim is limited to the existing record. The existing record reveals no error on the part of counsel with respect to the admission into evidence of defendant's incriminating statement. There is no evidence that defendant was in custody at the time the statement was made, meaning that the alleged failure of the police to advise defendant of his *Miranda* rights is of no moment.

With respect to defendant's claim that trial counsel should have moved to sever defendant's trial from that of his codefendants, defendant fails to advance any support for this position in his brief on appeal. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Therefore, we decline to address this issue further.

Second, defendant challenges the sufficiency of the evidence produced at trial. For the reasons set forth above in the discussions of defendants Vincent and Thomas Prazuch, this argument fails.

Third, defendant claims error in the scoring of several offense variables. Because we do not find the sentences imposed to be disproportionate in light of the offense and the offender, *Milbourn, supra*, we decline to review this issue further. See *Mitchell, supra*.

Finally, Sidney Burrell claims he was denied a fair trial because the prosecutor failed to produce res gestae witnesses Tomisha Williams, Detective Beardon and Cheryl Ball. Where the issue of a possible missing res gestae witness is not raised during the course of trial, the issue must be raised in a post-trial *Robinson*³ hearing in order to perfect the issue for appeal. *People v Jacques*, 215 Mich App 699, 702; 547 NW2d 349 (1996).

First, this issue has not been preserved. *Jacques, supra*. Second, defendant is mistaken that Tomisha Williams and Cheryl Ball did not testify. They testified on September 29, 1994. Third, all parties agreed to waive the testimony of Detective Beardon as it was determined it would be cumulative to the testimony of Sergeant Fields. Finally, while the prosecutor has a continuing duty to give notice of all known res gestae witnesses and to advise the defendant of the witnesses it will produce, it is the defendant's responsibility to determine which witnesses he wants produced at trial. MCL 767.40a; MSA 28.980(1); *People v Burwick*, 450 Mich 281, 287-291 (1995). Accordingly, the Court finds no merit to this issue.

Defendant Sidney Burrell's convictions and sentences are affirmed, but we remand to allow the trial court to clarify the judgment of sentence. See note 1.

Stephen Marks

Defendant Stephen Marks first contends that he was denied a fair trial and due process of law where the trial court denied a request by the jurors to take notes. Defendant did not preserve this issue for appeal and has not demonstrated how this prejudiced him. The trial court did not abuse its discretion when it denied the request. *People v White*, 168 Mich App 596, 608; 425 NW2d 193 (1988); *People v Young*, 146 Mich App 337, 340; 379 NW2d 491 (1985).

Defendant also claims he was denied a fair trial and due process of law because the prosecutor made improper rebuttal arguments which appealed to the sympathy and prejudice of the jurors. Defendant did not object at trial to the remarks he now claims to have prejudiced him. Appellate review of improper prosecutorial remarks is generally precluded absent objection by counsel, because the trial court is otherwise deprived of an opportunity to cure the error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). An exception exists if a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). Because a curative instruction could have mitigated any prejudicial impact in the present case, we decline to find error requiring reversal.

Defendant Stephen Marks' convictions are affirmed.

/s/ Gary R. McDonald
/s/ Maureen Pulte Reilly
/s/ Peter D. O'Connell

¹ The respective judgments of sentence of these defendants each contains an ambiguous reference to MCL 750.520b; MSA 28.788(2), the statute dealing with first-degree criminal sexual conduct. However, our review of the record and verdict forms indicates that they were convicted of only third-degree criminal sexual conduct.

² *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965)

³ *People v Robinson*, 390 Mich 629; 213 NW2d 106 (1973).