STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL JASON MCCOWAN,

Defendant-Appellant.

UNPUBLISHED
December 9, 1997

No. 193970
Calhoun Circuit Court
LC No. 95-001074-FC

Before: Smolenski, P.J., and MacKenzie and Neff, JJ.

PER CURIAM.

Defendant was convicted by a jury of one count of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(d); MSA 28.788(2)(1)(d), and three counts of third-degree criminal sexual conduct (CSC III), MCL 750.520d; MSA 28.788(4). Defendant was sentenced to concurrent terms of eighteen to thirty years' imprisonment for the CSC I conviction and eight to fifteen years' imprisonment for each CSC III conviction. Defendant appeals as of right. We affirm.

Defendant's convictions arise out of an April, 1995, incident in which a friend of defendant's, Jeremy Trimm, persuaded the complainant to come to a party where the two of them engaged in consensual sex. However, defendant and Trimm, individually, together and with others, then sexually assaulted the complainant multiple times without her consent.

On appeal defendant first raises an evidentiary issue. As background, we note that at trial a witness, Leslie Stinnett, testified concerning an August, 1994, incident in which she was sexually assaulted multiple times by defendant and Trimm in a manner similar to the sexual assaults that occurred in this case. A police officer testified that defendant indicated that the sexual conduct between himself and Stinnett was consensual. Defendant now argues that this evidence of his prior bad acts was erroneously admitted solely for the impermissible purpose of showing his propensity to commit the crimes charged in this case. We disagree. In deciding to admit this evidence in this case, the trial court performed the analysis required by *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993). Specifically, the trial court first found that the evidence was relevant to an issue other than propensity, i.e., "a lack of consent and/or a scheme or a plan." *Id*. at 55, 74. The trial court next found that this

evidence was relevant to a fact of consequence at trial where defendant's defense in this case was consent. *Id*. The trial court next found that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. *Id*. at 55, 75. Finally, the trial court gave the jury a limiting instruction on the use of this evidence before Stinnett testified, after the police officer testified and during final jury instructions. *Id*. Accordingly, we conclude that the trial court did not abuse its discretion in admitting this evidence. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995).

Next, defendant raises issues concerning discovery and prosecutorial misconduct. As background, we note that an evidentiary hearing concerning the admissibility of Stinnett's testimony was conducted in this case on December 14, 1995. On January 11, 1996, five days before trial, the prosecutor gave defense counsel a report that had been in the possession of the prosecutor's office for over a year. This report contained statements by Stinnett concerning the sexual assaults perpetrated on her by defendant and Trimm. Defendant requested the trial court to reconsider its ruling on the admissibility of Stinnett's testimony and exclude this testimony in light of the prosecution's failure to produce the report in a timely manner. The trial court, finding no intentional misconduct on the part of the prosecution, denied defendant's request.

Defendant now contends that the prosecutor committed misconduct in failing to furnish the report to the defense before the evidentiary hearing. Defendant claims that he was prejudiced because Stinnett's statement in the report could have been used to impeach Stinnett's testimony at the evidentiary hearing. Defendant also argues that in light of the untimely production of the report the trial court erred in refusing to exclude Stinnett's testimony at trial.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). A trial court's finding of intentional prosecutorial misconduct is a mixed question of fact and law. *People v Tracey*, 221 Mich App 321, 323; 561 NW2d 133 (1997). This Court reviews factual findings under the clearly erroneous standard and reviews questions of law de novo. *Id*.

In criminal cases tried after January 1, 1995, discovery is governed by MCR 6.201. *Tracey, supra* at 323. Under MCR 6.201(A)(2), "a party upon request must provide to all other parties . . . any written or recorded statement by a lay witness whom the party intends to call at trial . . . ." See also *Tracey, supra*. MCR 6.201(I) provides that "[i]f a party fails to comply with this rule, the court, in its discretion, may order that testimony or evidence be excluded, or may order another remedy."

In this case, the defense requested the prosecution to produce any written statements by any lay witnesses the prosecution intended to call at trial. Thus, the prosecution certainly had an obligation under the court rules to give the report containing Stinnett's statement to the defense. MCR 6.201(A)(2). The prosecutor explained below that the report had been prepared by an employee of the prosecutor's office working in the client victims service unit. The employee had interviewed Stinnett and prepared the report containing Stinnett's statement for the purpose of authorizing a warrant for defendant's arrest with respect to his August, 1994, assault of Stinnett. The warrant was ultimately denied and the employee filed the report away. The employee did not remember that she had this

report until Stinnett was in the prosecutor's office approximately a week before the scheduled trial in this case. After being informed of the existence of the report by the employee, the prosecutor turned the report over to the defense the next day. After reviewing the record, we conclude that the trial court's finding of no intentional prosecutorial misconduct was not clearly erroneous. *Tracey, supra*. In denying defendant's request to exclude Stinnett's testimony at trial, the trial court noted that the defense could use the report to impeach Stinnett's trial testimony and that it was going to leave the determination of Stinnett's credibility to the jury. We find no abuse of discretion in the trial court's refusal to exclude Stinnett's testimony. MCR 6.201(I). And, where the defense had the report to use at trial, we further find that the prosecutor's failure to earlier provide defendant with the report did not deny defendant a fair and impartial trial. *McElhaney, supra*.

Next, defendant argues that certain members of the jury were erroneously exposed to prejudicial extraneous information during trial. As background we note that on the second day of trial defense counsel informed the court that the previous evening's edition of the local newspaper had printed information indicating that Trimm had been convicted of CSC I and sentenced to twenty-two to forty-two years' imprisonment. After separate interviews with each juror, it was determined that four jurors had read this information in the newspaper. The defense moved for a mistrial on this basis. The trial court denied the motion. Defendant now argues that the trial court erred in denying his motion for a mistrial.

We review the trial court's decision on a motion for mistrial for an abuse of discretion. *People v Manning*, 434 Mich 1, 7, 21; 450 NW2d 534 (1990) (Riley, C.J., with Griffin and Boyle, JJ.) (Brickley, J., concurring). We will find an abuse of discretion only where denial of the motion deprived defendant of a fair and impartial trial. *Id*. The issue before the trial court was whether the jurors' exposure to the information in the newspaper prejudiced defendant.. The general rule is as follows:

> Whether or not prejudice warranting a new trial results from the reading by the jurors of news articles or seeking or hearing broadcasts must turn on the special facts of each case, and the question is left largely to the determination and discretion of the trial court. [*People v Grove*, 455 Mich 439, 472; 566 NW2d 547 (1997).]

In this case, the information in the newspaper did not indicate that Trimm's conviction and sentence arose of the sexual assaults that were also the subject of defendant's trial. Each member of the jury who had read the information in the newspaper concerning Trimm's conviction and sentence unequivocally stated to the court that they could set aside this information and hear defendant's case impartially. In light of these facts and circumstances, we conclude that the trial court did not abuse its discretion in denying defendant's motion for a mistrial. Cf *Grove*, *supra* at 475-476. We further conclude that any error in the trial court's failure to caution the jury at the conclusion of the first day of trial to not read, listen or watch any news accounts that might concern this case was harmless.

Next, defendant raises another evidentiary issue. As background, we note that at trial, the prosecution questioned the nurse who had examined the complainant following defendant's sexual assaults. While testifying, the nurse had with her the notes she had made during this examination. When the prosecutor asked the nurse to "just read that one sentence of your notes regarding that particular

item," defendant objected. During a bench conference outside the presence of the jury, the prosecutor stated that he would withdraw the question. Defendant requested that the notes be admitted into evidence. The trial court did not rule on this request and simply informed the jury that the prosecutor had decided to withdraw the question.

Defendant now argues that the trial court erred in refusing to admit the notes because it left the jury with the impression that there was information in the report adverse to defendant that was being kept from the jury. We find no error. The record reveals that the prosecutor was simply trying to lay a foundation should defense counsel wish to admit the notes on cross-examination as a writing to refresh memory. See, generally, MRE 612. The trial court did not foreclose defense counsel from admitting the notes into evidence during counsel's cross-examination of the nurse. However, defense counsel did not seek to do so. Defendant may not assign error on appeal to something that his own defense counsel deemed proper at trial. *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995). In any event, any possibility that the jury would make an adverse inference against defendant was eliminated by the trial court's final instructions to the jury to not consider the objections of the parties and the trial court's rulings as evidence in the case.

Last, defendant challenges the sentencing court's scoring of several offense variables. However, defendant's challenges are directed to the court's alleged misinterpretation or misapplication of the offense variables. Accordingly, defendant has failed to state a cognizable claim for relief. *People v Mitchell*, 454 Mich 145, 177; 560 NW2d 600 (1997).

Affirmed.

/s/ Michael R. Smolenski
/s/ Barbara B. MacKenzie
/s/ Janet T. Neff