STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD EUGENE DAUGHERTY,

Defendant-Appellant.

UNPUBLISHED
December 23, 1997

No. 190681
Monroe Circuit Court
LC No. 95-026885-FH

Before: McDonald, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of third-degree criminal sexual conduct, MCL 750.520d(1)(b); MSA 28.788(4)(1)(b) He was sentenced as an habitual offender, MCL 769.11; MSA 28.1083, to an enhanced sentence of sixteen to thirty years' imprisonment. Defendant appeals as of right. We affirm and remand.

Defendant first argues that defense counsel's failure to interview Gail Williamson constituted a denial of the effective assistance of counsel. Williamson was the person to whose home the complainant went after defendant's sexual assault. Williamson was listed on the prosecution's witness list but never called to testify at trial. Defendant contends that had defense counsel interviewed Williamson, she would have provided a conduit to both Jerry Joe Furlong, who would have testified that the complainant told him that she had not been raped by defendant, and Loreida Dozier, who allegedly would have substantiated defendant's theory of the case that the complainant wanted to trade sex for crack and that her puffy eyes and bloody nose resulted not from defendant's assault but from a tantrum the complainant had when defendant did not trade sex for crack.

A defendant who claims that he was denied the effective assistance of counsel must demonstrate two components. First, the defendant must show that counsel's performance was deficient, which requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *People v Johnson*, 451 Mich 115, 121, 124; 545 NW2d 637 (1996). Second, the defendant must show that the deficient performance prejudiced the defense to the extent that the defendant was deprived of a fair trial whose result is reliable. *Id*. Every effort must be

made to eliminate the distorting effects of hindsight. *Id*. at 122. The defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Id*. at 122, 124. And, the defendant must show that, but for counsel's errors, the result of the proceeding would have been different. *Id.*

Trial counsel's mere failure to interview witnesses does not establish inadequate preparation. *People v Alcarta,* 147 Mich App 326, 331-332; 383 NW2d 182 (1985). In order for a defendant to establish that inadequate preparation of trial counsel was ineffective assistance of counsel, the defendant must show that the failure of counsel to prepare resulted in counsel's ignorance of valuable evidence which would have substantially benefited the defense. *People v Cabellero,* 184 Mich App 636, 642; 459 NW2d 80 (1990).

In this case, Williamson was not present when the complainant was sexually assaulted. Defense counsel testified at the *Ginther*[1] hearing that he did not interview Williamson because he had no information that she might possess exculpatory information and he relied on the police report indicating that Williamson would be a hostile witness to defendant. We conclude that under these circumstances counsel's decision to not interview Williamson was a tactical decision and did not constitute a deficient performance to the extent that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Cf *People v Mitchell*, 454 Mich 145, 165; 560 NW2d 600 (1997), with *Johnson, supra* at 122.

Moreover, even if defense counsel should have interviewed Williamson with the result that he would have learned of and then interviewed Dozier and Furlong, we note that Dozier's proposed testimony, as evidenced by her affidavit, consisted only of arguably inadmissible impeachment of the complainant on collateral matters. Moreover, Furlong's proposed testimony, as also indicated in his affidavit, that the complainant told him that she had not been raped, was not necessarily inconsistent with certain evidence presented at trial. Specifically, evidence was presented indicating that the complainant had not initially informed the police that defendant had actually penetrated her and had not initially known whether defendant had actually accomplished having sexual intercourse with her. Evidence was also presented indicating that the complainant informed the doctor who examined her following defendant's assault that defendant had "attempted" to penetrate her vagina with his penis. The complainant's lack of preciseness in describing defendant's assault apparently stemmed from the fact that she was wearing a bathing suit when defendant's assault occurred and thus the bathing suit prevented defendant from fully penetrating her. Accordingly, even assuming that counsel erred in failing to interview Williamson, Dozier and Furlong, we are not convinced that, but for counsel's errors, the result of defendant's trial would have been different. Therefore, we conclude that defendant failed to establish that he was denied the effective assistance of trial counsel.

Next, defendant argues that the trial court erred in finding that the verdict was not against the great weight of the evidence and, accordingly, abused its discretion in denying defendant's motion for a new trial. Defendant contends that the verdict was against the great weight of the evidence because the physical evidence conflicted with the complainant's testimony concerning defendant's sexual assault. We disagree.

This Court reviews the trial court's grant or denial of a motion for a new trial for an abuse of discretion. *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993). Whether a verdict is against the great weight of the evidence requires a review of the whole body of evidence. *Id.* at 475. When a motion for a new trial is made on the ground that the verdict is against the great weight of the evidence, the trial judge sits as a thirteenth juror and may evaluate the credibility of the witnesses. *Id.* at 476-477.

The testimony of a victim need not be corroborated in prosecutions for third-degree criminal sexual assault. MCL 750.520h; MSA 28.788(8). However, in this case, and contrary to defendant's assertion, there was medical testimony that demonstrated that the victim had been assaulted and that she suffered trauma in the form of bruises on her face and thigh, a scratched nose, and lacerations around her vaginal area. The only evidence to support defendant's defense, besides defendant's own contradictory stories of what happened on the night in question, was the testimony of two of defendant's close friends who could only testify that they did not hear any screaming or yelling from their location in the house where the assault occurred. Accordingly, we conclude that the verdict was not against the great weight of the evidence. The trial court did not abuse its discretion in denying defendant's motion for a new trial on this ground. *Herbert, supra*.

Next, defendant argues that the prosecutor engaged in various instances of misconduct.

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).

Specifically, defendant first contends that the prosecutor improperly vouched for the complainant's credibility and defendant's guilt by repeatedly referring to the charged incident as a "rape" and by eliciting the complainant's testimony that she had attended "rape" counseling. We disagree that these remarks constituted improper vouching for credibility or guilt. In overruling defense counsel's objection to the characterization of the crime at issue as a "rape," the court instructed the jury that the jury would determine the facts. During final instructions, the court also instructed the jury on both the elements of third-degree criminal sexual conduct and what the jury could consider as evidence of this crime. We conclude that defendant was not denied a fair and impartial trial on this ground. *Id.*

Second, defendant argues that the prosecutor injected improper prejudice into the proceedings by eliciting the complainant's testimony that since defendant's assault she had begun to see a counselor and to experience nightmares. Defendant objected below to this testimony on the ground of relevance. The prosecutor responded that the testimony was probative of the fact that the complainant had undergone a severe traumatic event. The trial court overruled defense counsel's objection on the ground that the testimony was somewhat relevant. We decline to find an abuse of discretion in this ruling. *People v Phillips*, 217 Mich App 489, 497; 552 NW2d 487 (1996). We likewise conclude that defendant was not denied a fair and impartial trial on this ground. *McElhaney, supra*.

Third, defendant argues that the prosecutor injected improper prejudice into the proceedings by having the complainant remove her false teeth in front of the jury. We note that the complainant testified that her nightmares had caused her to start grinding her teeth in her sleep and that her two front teeth

were now false because she had "broken my two front teeth out . . . .". Defense counsel objected to this testimony on the ground that it was inflammatory. The trial court overruled the objection on the ground that the evidence was "more probative than prejudicial." See MRE 403. Again, we decline to find an abuse of discretion in this ruling. *Phillips, supra*. We likewise conclude that defendant was not denied a fair and impartial trial on this ground. *McElhaney, supra*.

Fourth, defendant argues that during closing and rebuttal argument the prosecutor improperly (1) disparaged defense counsel; (2) evoked juror sympathy for the complainant, and; (3) distorted and diluted the burden of proof. However, defendant failed to object to these alleged instances of misconduct. Appellate review of improper prosecutorial remarks is generally precluded absent a timely objection unless a curative instruction could not have eliminated the prejudicial effect of the remarks or the failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). In this case, a timely curative instruction could have cured the prejudice, if any, arising from the prosecutor's remarks. Accordingly, we decline to consider this issue.

Defendant also argues that defense counsel's failure to object to these remarks denied defendant the effective assistance of counsel. However, defense counsel's testimony at the *Ginther* hearing indicates that he did not object to the prosecutor's remarks that allegedly disparaged counsel for tactical reasons. With respect to the other remarks, we conclude that, even assuming error on the part of defense counsel, we are not persuaded that, but for counsel's errors, the result of defendant's trial would have been different. *Johnson, supra* at 121, 124. Thus, defendant has failed to establish that he was denied the effective assistance of counsel because counsel failed to object to certain portions of the prosecutor's closing and rebuttal argument. *Id*.

Next, defendant argues that the trial court denied defendant his right to present a defense. The substance of defendant's argument is that the trial court erred with respect to several evidentiary rulings. Specifically, defendant first argues that the trial court erred in not allowing defendant to present evidence that the prosecution paid for the complainant's flight from Texas, where she was living at the time of trial, as well as her motel and food expenses during the trial. Defendant argues on appeal, as he did below, that the fact that the complainant obtained "a free vacation" was relevant to the complainant's credibility.

Evidence of the credibility, bias or prejudice of a witness is always relevant. MRE 401; *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995); *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). However, the right of cross-examination does not confer an unlimited right to admit all relevant evidence.. *Adamski, supra*. Rather, the trial court retains a wide latitude to impose reasonable limits on cross-examination based on concerns about interrogation that is only marginally relevant. *Id*.

In this case, the prosecutor explained below that the prosecutor's office always pays the transportation expenses of all witnesses and that if the trial court ruled in defendant's favor on this issue "I would expect from here on out that in every criminal case that it could be brought out that we pay a $6.00 fee or a $12.00 fee a day, plus mileage in every single case, for every single witnesses as if that effects their – their credibility." The prosecutor further explained that the complainant was not receiving

a "free vacation," but rather that the complainant was brought in the evening (Monday) before the trial started, and that

> I met with her Monday evening. She was in Court all day yesterday, is expected to be in Court all day today, flies out tomorrow morning. She's here no longer than necessary for the trial. We're paying for her lodging no longer than for the trial and we do this in every case.

In disallowing the evidence, the trial court stated that, barring unusual circumstances indicating that the prosecutor's office was treating the complainant differently than other witnesses, it was not "really significant" that the prosecutor's office paid the complainant the usual statutory fee paid other witnesses. We note that defendant had a reasonable opportunity to otherwise test the truthfulness of the complainant's credibility. *Id*. We find no abuse of discretion with respect to this issue because the evidence that the prosecutor's office paid the complainant's transportation and accommodation expenses was only marginally relevant. *Id*.

Second, defendant argues that the trial court erred in sustaining the prosecutor's objection when defense counsel asked a defense witness if the prosecutor had told the witness that she (the prosecutor) did not know whether defendant had "committed a rape." We disagree and find no abuse of discretion in this regard. *Phillips, supra*.

Third, defendant argues that the trial court erred in ruling inadmissible photographs and other evidence describing the extent of the injuries the complainant inflicted upon a witness in a physical altercation that occurred the day after defendant's assault. The trial court ruled that the extent of the injuries was not relevant. We agree and find no abuse of discretion. MRE 401; *Phillips, supra*.

In summary, we conclude the trial court did not deny defendant his right to present a defense.

Finally, defendant argues that he was denied a fair trial when the trial court instructed the jury with CJI2d 20:25 (testimony of the victim need not be corroborated). However, defendant did not object to this instruction at trial. Generally, the failure to object to a jury instruction waives appellate review unless relief is necessary to avoid manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). Manifest injustice occurs when an erroneous instruction pertained to a basic and controlling issue of the case. *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997). We find no manifest injustice in this case because the disputed instruction accurately stated the law. See MCL 750.520h; MSA 28.788(8) (the testimony of a victim need not be corroborated in prosecutions for third-degree criminal sexual conduct).

In summary, we affirm defendant's convictions. However, we note that the only judgment of sentence entered in the lower court file erroneously indicates that defendant was convicted of assault with intent to commit sexual penetration, MCL 750.520g(1); MSA 28.788(7)(1). Accordingly, we remand to the trial court for the purely administrative task of correcting, if necessary, the judgment of sentence to reflect that defendant was convicted of third-degree criminal sexual conduct, MCL

750.520d(1)(b); MSA 28.788(4)(1)(b). The trial court shall ensure that the corrected judgment of sentence is transmitted to the Department of Corrections. We do not retain jurisdiction.

Affirmed and remanded.

/s/ Gary R. McDonald
/s/ Henry William Saad
/s/ Michael R. Smolenski

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).