STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK ANTHONY SHEPPARD,

Defendant-Appellant.

UNPUBLISHED
June 19, 1998

No. 191860
Recorder's Court
LC No. 95-004068 FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MIQUEL DETAUN RAYFORD,

Defendant-Appellant.

No. 193197
Recorders Court
LC No. 95-003365

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEON ALEX POWELL,

Defendant-Appellant.

No. 193319
Recorder's Court
LC No. 95-004064

Before: Holbrook, Jr., P.J., and Young, Jr., and J.M. Batzer*, JJ.

PER CURIAM.

In a consolidated jury trial, defendants Sheppard and Powell were tried before a single jury, and defendant Rayford was tried before a separate jury. Sheppard was convicted of three counts of first-degree criminal sexual conduct (CSC)—accomplice, MCL 750.520b(1)(d); MSA 28.788(2)(1)(d), and three counts of first-degree CSC—weapon, MCL 750.520b(1)(e); MSA 28.788(2)(1)(e). Rayford was convicted of three counts of first-degree CSC—accomplice. Powell was convicted of three counts of first-degree CSC—accomplice, three counts of first-degree CSC—weapon, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). This Court consolidated defendants' appeals as of right and we now affirm.

No. 191860

Defendant Sheppard argues that he was deprived of a fair trial by the trial court's curative instruction regarding the testimony of defense witness Letrease Whitaker, and codefendant Powell's failure to provide notice of his intention to present alibi testimony. Defendant Sheppard's failure to raise a timely and specific objection on the record to the alleged instructional error precludes appellate review absent a showing of manifest injustice.[1] MCR 2.516(C); MCR 6.001(D); *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993).

Jurors are presumed to have followed a court's instructions unless the contrary is clearly shown. *People v McAlister*, 203 Mich App 495, 504; 513 NW2d 431 (1994). Because (1) the trial court prefaced the challenged curative instruction by informing the jury that it applied to defendant Powell only, (2) the jury was not precluded from accepting or rejecting Whitaker's testimony, and (3) as is discussed *infra*, we have concluded that Whitaker's testimony was not presented as alibi testimony, defendant Sheppard has not established that manifest injustice occurred. *Van Dorsten*, *supra* at 545.

No. 193197

Defendant Rayford argues that the trial court's instructions failed to adequately inform the jury regarding the charges against him. We disagree. Jury instructions are to be considered as a whole rather than extracted piecemeal to establish error. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). Even if somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.* Because Rayford failed to object to the challenged instructions at trial, and in fact expressed his satisfaction, relief may be granted only upon a showing of manifest injustice. *Van Dorsten*, *supra*.

The prosecution's theory was that Rayford was guilty of Count I (digital penetration) as a principal and guilty of Counts II and III (fellatio and vaginal intercourse, respectively) as an aider and abettor. Contrary to defendant Rayford's argument, we find no error requiring reversal where the trial court instructed the jury as to Count I on a theory of aiding and abetting. Here, evidence was presented that Rayford engaged in digital penetration of the complainant's vagina while assisted by his codefendants. Because this evidence tended to show a joint commission of the charged offense, we conclude that no manifest injustice will result by our declining to review this issue further. See *People v*

Triplett, 68 Mich App 531, 542-543; 243 NW2d 665 (1976); *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995).

As to Counts II and III, Rayford argues that the trial court's instructions were inadequate because they failed to explain to the jury which person the prosecution sought to show as the principal for each count. Although it is true that the guilt of the principal must be shown in order to sustain a finding of guilt on a theory of aiding and abetting, the evidence need not show that a specifically named individual was the guilty principal. *People v Vaughn*, 186 Mich App 376, 382; 465 NW2d 365 (1990). Thus, we conclude that the trial court's instructions on Counts II and III, which were given pursuant to CJI2d 20.1 and 20.7, fairly presented the issues to be tried and sufficiently protected defendant Rayford's rights. *Bell*, *supra* at 276. Accordingly, no manifest injustice has been shown.

No. 193319

Defendant Powell's first three arguments on appeal concern the effect of the trial court's comments and rulings with respect to the testimony of defense witness Latrease Whitaker. Specifically, defendant Powell argues that he was denied a fair trial as a result of instructional error, misconduct of the trial judge, and/or ineffective assistance of counsel. We find no error requiring reversal.

Powell's defense theory at trial was one of consent, not alibi. The consent theory was established by Powell's trial counsel in his opening statement to the jury and in his attempt to impeach the complainant during cross-examination by eliciting testimony that, on the evening of February 21, 1995, she had smoked marijuana and drank alcohol with defendant Powell, whom she considered to be a "good friend." Powell's counsel attempted to show that the complainant's memory and perception of reality may have been distorted by her consumption of alcohol and marijuana, something the complainant conceded she did on a regular basis. Specifically, the complainant testified that she did not recall whether she had smoked marijuana before calling Powell at about 9:00 p.m. that evening, but she conceded it was "possible." The complainant further testified that Powell picked her up that evening at "about 10:00, 10:30," but she "wasn't positive," and that after making two stops—one for alcohol and one for marijuana—they drove to the Chandler Park Drive residence. Upon arriving, they started drinking alcohol and smoking a "blunt," a large marijuana cigar. The complainant testified that they had been smoking and drinking for about twenty minutes when codefendants Sheppard and Rayford arrived at the house and the assaults began. She testified that she was assaulted by defendants for a "long time," but was unable to recall whether it was one hour or several. Based on the testimony of other prosecution witnesses, it appears that the complainant escaped from the house sometime between 5:00 and 6:00 a.m. the following morning.

At the close of the prosecution's proofs, Latrease Whitaker was called to testify on behalf of defendant Powell. She testified that at about 9:00 p.m. on February 21, 1995, defendant Powell picked her up at her house and they drove to defendant's house in Southfield where they watched videos until after midnight. Hence, Whitaker's testimony disputed the complainant's testimony as to the whereabouts of defendant Powell for the two hours between 10:00 p.m. and midnight. The prosecutor objected to Whitaker's testimony on the basis that defendant Powell had not filed the statutorily-required notice of an intent to present an alibi defense.[2] Powell's trial counsel argued that Whitaker's

testimony was not being presented as alibi testimony, but rather to impeach the complainant's credibility. The trial court agreed with the prosecutor that Whitaker was an alibi witness, and found that defense counsel had intentionally failed to file a notice of alibi. The court made an unnecessary and derogatory comment toward defense counsel, then ruled that the appropriate remedy was not to strike the testimony but rather to instruct the jury that, when evaluating Whitaker's testimony and credibility, it could take into account Powell's failure to file the required notice. Powell's trial counsel objected to the proposed instruction only to the extent that it denigrated Whitaker's credibility. After the trial court altered the proposed instruction pursuant to counsel's objection and so instructed the jury, Powell's counsel expressed his satisfaction with the instructions as given.

Defendant Powell first argues that he was denied a fair trial because of the trial court's curative instruction. Given the defense theory of consent and the attack on the complainant's credibility—i.e., whether her perception of the events that evening was distorted by her drug and alcohol use—we are of the view that Latrease Whitaker was properly called by defendant Powell as a non-alibi defense witness. Thus, the trial court erred in finding otherwise, and in giving the curative instruction to the jury. We find the error to be harmless, however, because the curative instruction did not preclude the jury from accepting or rejecting Whitaker's testimony. Moreover, we are not persuaded that any rational juror would have voted to acquit defendant Powell on the sole basis of the erroneous curative instruction. Accordingly, we find no error requiring reversal on this basis.

Defendant Powell next argues that he was denied effective assistance of counsel. To establish ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney as guaranteed by the Sixth Amendment. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). The deficiency must be prejudicial to the defendant. *Id.* Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Because defendant Powell failed to move for an evidentiary hearing or a new trial on the basis of ineffective assistance of counsel, our review is limited to the available record. *People v McMillan*, 213 Mich App 134, 141; 539 NW2d 553 (1995).

Defendant Powell argues that his trial counsel was rendered ineffective when the trial judge made derogatory personal comments toward counsel, ruled that counsel's failure to file a notice of alibi was done in bad faith, and chastised counsel for the perceived interjection of irrelevant issues at trial. The right to effective assistance of counsel focuses on the actual assistance received. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). As discussed above, we have found trial counsel's conduct regarding witness Latrease Whitaker to constitute reasonable trial strategy under the circumstances. Indeed, because the defense theory was one of consent, we believe that had Powell's trial counsel presented Whitaker as an alibi witness, as the trial court ruled he should have, he may have arguably violated the Rules of Professional Conduct, which prohibit the subornation of perjury. See *People v Hubbard*, 156 Mich App 712, 715-716; 402 NW2d 79 (1986). "Trial counsel's refusal to prepare and present a defense which would have been premised upon what he reasonably believed was perjured testimony was not unreasonable conduct, nor a serious mistake which deprived defendant of a

reasonably likely chance of acquittal." *Id.* at 716. Cf. *People v Harrison*, 163 Mich App 409; 413 NW2d 813 (1987) (trial counsel's decision to call a defense witness to describe the defendant's appearance at the time of the events rather than calling him as an alibi witness was done for the tactical reason of preventing the prosecution from attacking the witness' credibility and did not constitute ineffective assistance of counsel or deprive the defendant of a fair trial).

Moreover, although the trial judge's derogatory comments toward counsel were wholly inappropriate, our review of the entire record does not indicate that the judicial veil of impartiality was pierced or that defendant Powell suffered outcome-determinative prejudice because of the trial judge's feelings toward counsel.[3] Contrary to defendant's assertions, the record does not support a finding that the trial court considered extrajudicial information regarding defense counsel when it fashioned its remedy for the perceived violation of the alibi notice statute. Also, we are not persuaded by defendant's argument that the trial court may have imposed a harsher sentence against defendant Powell in response to what the court perceived was counsel's interjection of irrelevant issues at trial. Contrary to defendant's claim, the trial court did not sentence defendant to the "high end of the guidelines." In fact, notwithstanding that defendant had a prior criminal conviction and that he had a leadership role in these offenses, the court sentenced defendant at the lower end of the recommended guidelines range of fifteen to thirty years. In imposing sentence, the trial court noted that it believed defendant's convictions were supported by the evidence, particularly noting that it had found the complainant's testimony to be credible. Accordingly, the record does not support defendant's claim that trial counsel was rendered ineffective because of the trial judge's negative perception toward counsel.

Finally, defendant Powell argues that the general jury instruction applicable to the felony-firearm charge, CJI2d 11.34, improperly negated the requirement that Powell be convicted of the underlying felony before being convicted of felony-firearm. This argument has been addressed and rejected by the Michigan Supreme Court. See *People v Lewis*, 415 Mich 443, 455; 330 NW2d 16 (1982).

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ James M. Batzer

I concur in Nos. 191860 and 193197 and concur in result only in No. 193319.

/s/ Robert P. Young, Jr.

[1] At trial, Sheppard initially objected to the proposed curative instruction on the ground that it should not pertain to him because he did not present an alibi witness. In response to Sheppard's initial objection, the trial court agreed that the instruction would be directed toward Powell only. Thereafter, Sheppard did not object to the wording of the instruction itself or on the basis that the instruction directed toward Powell would have a prejudicial effect on his case. Moreover, after the trial court read the jury

instructions, including the curative instruction regarding Powell's failure to provide a notice of alibi, Sheppard's counsel indicated his satisfaction with the instructions.

[2] See MCL 768.20; MSA 28.1043.

[3] Fortunately, the comments were made outside the presence of the juries.