

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRY DWAYNE ROBERTSON,

Defendant-Appellant.

UNPUBLISHED

October 2, 1998

No. 202986

Washtenaw Circuit Court

LC No. 96-005687 FH

Before: MacKenzie, P.J., and Bandstra and Markman, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit criminal sexual conduct, MCL 750.520g(1); MSA 28.788(7)(1), and was sentenced to ten to twenty years' imprisonment. He appeals as of right. We affirm.

Defendant first claims that the prosecutor improperly shifted the burden of proof to defendant when it questioned the officer in charge of the case about defendant's notice of alibi before defendant raised an alibi defense. Defendant failed to object to the prosecutor's questions regarding his alibi defense. Our review is therefore limited to whether a curative instruction could have eliminated the prejudicial effect of the alleged misconduct or whether a miscarriage of justice would occur if the issue was not reviewed. *People v Dunham*, 220 Mich App 268, 274; 559 NW2d 360 (1996). Although testimony or comments regarding a defendant's proposed alibi defense before a defendant presents such a defense are discouraged, this Court has nonetheless held that such testimony or comments do not necessarily prejudice a defendant, especially when no objection is raised and the defendant does present an alibi defense. See *People v Burwick*, 133 Mich App 141, 148; 348 NW2d 307 (1984); *People v Dean*, 103 Mich App 1, 8; 302 NW2d 317 (1981). Here, defendant did not object to the prosecutor's questions, and defendant presented an alibi defense. Furthermore, had it been requested, a curative instruction would have eliminated any prejudice to defendant. A miscarriage of justice will not result from our failure to further review this issue on appeal.

Defendant next contends that the trial court abused its discretion when it ruled that defendant could not testify about certain prior negative police contacts that caused defendant to give a false

inculpatory statement to a detective in this case. We disagree. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403. In this case, any evidence of defendant's prior negative experiences with the police was marginally probative; it had nothing to do with the substantive facts of the present case and could be given undue weight by a jury. Further, allowing defendant to present testimony of his prior negative experiences with the police would have unfairly distracted the jury from the substantive issues in the case. In any event, defendant was allowed to testify that he was terrified when he gave his statement to the detective and that his fear stemmed from the fact that no one could see into the interview room should the detective strike him. Defense counsel was also allowed to explore any negative experiences between defendant and the detective. Under these circumstances, we find no abuse of discretion in the trial court's decision not to allow defendant to testify about his prior negative contacts with the police.

Defendant's final claim is that the trial court erred when, following a *Wade* hearing [*United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967)], it allowed the victim's in-court identification of defendant. After reviewing the evidence presented at the *Wade* hearing in light of the factors set forth by our Supreme Court in *People v Kachar*, 400 Mich 78, 95-96; 252 NW2d 807 (1977), we conclude that the trial court did not clearly err in determining that there was an independent basis to support the victim's in-court identification of defendant. It is clear that some of the factors examined weigh against finding an independent basis for the in-court identification, such as the fact that the victim had no prior relationship with defendant, the victim failed to identify defendant conclusively in two photographic lineups, and the victim had consumed twelve beers in the 4 1/2 hours before the attack. However, several other factors supported the finding of an independent basis. The victim had almost one hour to observe defendant and she was in face-to-face contact with him and was able to focus on his eyes during the attack. On two occasions, defendant walked down a lighted street with the victim. The length of time between the attack and the challenged identification was less than two months. The victim did not identify anyone else as her attacker. Her descriptions of her attacker after the assault were consistent and included a distinguishing feature--a missing right front tooth. Defendant is missing that tooth. Finally, the victim testified that, although she had been drinking before the attack, she did not have trouble thinking clearly. Nothing in the record disputes that testimony. On balance, it cannot be said that the court clearly erred in concluding that there was an independent basis upon which the victim's in-court identification of defendant could be based.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Richard A. Bandstra
/s/ Stephen J. Markman