STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RANDALL POWELL,

Defendant-Appellant.

UNPUBLISHED
February 19, 1999

No. 202804
Oakland Circuit Court
LC No. 94-133743 FC

Before: Hoekstra, P.J., and Doctoroff and O'Connell, JJ.

PER CURIAM.

A jury convicted defendant of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). Defendant was sentenced to ten to twenty years' imprisonment. He appeals as of right. We affirm.

Defendant was accused of engaging in criminal sexual conduct with a young girl. The victim's panties and vaginal swabs and smears were taken as evidence. DNA restriction fragment length polymorphism (RFLP) analysis of the forensic samples revealed that DNA from sperm found in the victim's panties matched defendant's DNA, and blood typing of the semen found in the victim's vagina and panties established that defendant could have been the source of the semen. In addition, the victim gave a detailed account of the sexual assault to a police officer, who testified to her statements at trial. According to the officer, defendant forced the victim to the floor, pulled down her pants and underwear, straddled her and penetrated her vagina with his penis. The victim fought defendant off and attempted to run upstairs, but defendant grabbed her and used his penis to penetrate her vagina again.

Defendant first argues that the prosecutor's use of peremptory challenges was unconstitutionally discriminatory because she systematically excluded black jurors and male jurors. We disagree.

A prosecutor cannot, consistent with the constitutional guarantee of equal protection, "challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." US Const, Am XIV; Const 1963, art 1, § 2[1]; *Batson v Kentucky*, 476 US 79, 89; 106 S Ct 1712; 90 L Ed 2d 69 (1986); *People v Barker*, 179 Mich App 702, 707; 446 NW2d 549 (1989). To raise a *Batson* objection to

the prosecutor's use of a peremptory challenge, a defendant initially bears the burden of making out a prima facie case of purposeful discrimination. *Barker*, *supra* at 705. A defendant establishes a prima facie case by showing that relevant circumstances raise an inference that the prosecutor exercised her peremptory challenge(s) to exclude venireperson(s) on account of race. The burden then shifts to the prosecutor to articulate a neutral explanation for excluding the challenged minority juror(s). The trial court then decides whether the defendant has established purposeful discrimination. *Id.* at 705-706.

The trial court did not abuse its discretion by rejecting defendant's *Batson* objection. While the prosecutor did use a peremptory challenge to exclude a black juror from the venire, defendant failed to show a pattern of strikes against black jurors. *Id.* at 705. Defendant has not shown any indication that the prosecutor's questions during voir dire evinced concern over the racial composition of the jury. *Id.* at 706. Indeed, at least one black person ultimately sat on defendant's jury. Moreover, the prosecutor's stated nondiscriminatory reasons for the peremptory challenge were reasonable and entirely plausible. The black juror may have been acquainted with a prosecution witness, and the juror's statements indicated that he may have believed a sexual assault victim's statements alone were insufficient to convict a person of criminal sexual conduct. In light of the circumstances, the trial court did not abuse its discretion in upholding the prosecutor's peremptory challenge.

Defendant also argues that the prosecutor used peremptory challenges to discriminate against male prospective jurors. Contrary to what the prosecutor suggested below, a prosecutor may not discriminate "in jury selection on the basis of gender, or on the assumption that an individual will be biased in a particular case for no reason other than the fact that the person happens to be a woman or happens to be a man" without running afoul of state and federal constitutional equal protection guarantees. *J E B v Alabama*, 511 US 127, 146; 114 S Ct 1419; 128 L Ed 2d 89 (1994). As with allegations of race-based discrimination, a defendant challenging the prosecutor's allegedly gender-based exercise of peremptory challenges must first establish a prima facie case of intentional gender discrimination. *Id.* at 144-145.

In the instant case, the prosecutor exercised only five out of fifteen peremptory challenges available in this capital case. MCL 768.13; MSA 28.1036. Defendant's jury was composed of seven male jurors and seven female jurors. The prosecutor did not ask any questions during voir dire that would lead one to believe that she was concerned about the gender of jurors or was acting on the assumption that male jurors would be predisposed to decide the case differently simply because of their gender. Based on the foregoing, we find that the trial court did not abuse its discretion by overruling defendant's objection to the prosecutor's use of peremptory challenges to exclude the four male jurors.[2]

Next, defendant argues that admission of the victim's rape account through the testimony of a police officer violated state and federal constitutional guarantees against ex post facto legislation. At trial, the victim testified that she had lied about the charged assault because defendant spanked her for violating a household rule forbidding her to have company in the house when she came home after school. The trial court admitted her prior, contrary statements to police pursuant to MRE 803(24) and 804(b)(6), the "catch-all" or "residual" hearsay exceptions. Because the offense for which he was tried occurred approximately 2 years before the hearsay exception took effect, defendant argues that application of the hearsay exceptions violates state and federal ex post facto guarantees. See US

Const, art I, § 10; Const 1963, art 1, § 10. Defendant argues that this violated the state and federal ex post facto guarantees because the offense for which he was tried occurred on May 27, 1994, and the hearsay exceptions took effect on April 1, 1996, approximately two years later. Although defendant did not advance this argument at trial, we may consider an important constitutional question absent a challenge in the trial court. *People v Morey*, 230 Mich App 152, 163; 583 NW2d 907 (1998). We review a constitutional issue de novo on appeal. *People v Darden*, 230 Mich App 597, 600; 583 NW2d 907 (1998).

We hold that admission of the victim's statements pursuant to MRE 803(24) and 804(b)(6) did not violate the ex post facto guarantees of the federal and state constitutions. Although the evidentiary rules were adopted subsequent to defendant's commission of the offense, application of these rules did not make defendant's crime a more serious offense, increase the punishment for defendant's crime, make defendant's act punishable where it was not previously, or make it possible for the prosecutor to obtain defendant's conviction on less evidence. A mere procedural change is not ex post facto, although it may disadvantage a defendant. *Riley v Parole Board*, 216 Mich App 242, 244; 548 NW2d 686 (1996). Moreover, under federal precedent:

> it is now well settled that statutory changes in the mode of trial or the rules of evidence, which do not deprive the accused of defense and which operate only in a limited and unsubstantial manner to his disadvantage, are not prohibited. [*Beazell v Ohio*, 269 US 167, 170; 46 S Ct 68; 70 L Ed 216 (1925).]

See also *Murphy v Sowders*, 801 F2d 205, 211 (CA 6, 1986). Because the evidentiary rules in question merely allow admission of testimony that carries with it sufficient circumstantial guarantees of trustworthiness, we do not see how the rule itself deprives defendant of a defense or operates in a substantial manner to his disadvantage. Obviously, it is not enough to simply argue that the evidence admitted under the rule is prejudicial. Rather, defendant must show how the new rules themselves operate to his disadvantage. Because he has not done so, we reject defendant's argument that admission of the victim's out-of-court statements pursuant to MRE 803(24) and 804(b)(6) was unconstitutional.

Next, defendant argues that the trial court abused its discretion by admitting the results of the RFLP analysis of the DNA extracted from the forensic samples taken in this case, which established a match between DNA in defendant's blood and DNA extracted from the seminal fluid found in the victim's panties. The prosecutor introduced the DNA evidence through the expert testimony of the scientist who performed the RFLP analysis at the Michigan State Police Laboratory (MSP lab). Defendant argues that *People v Adams*, 195 Mich App 267, 277; 489 NW2d 192 (1992), modified and remanded 441 Mich 916; 497 NW2d 182 (1993), stands for the proposition that the prosecutor was required to submit testimony from independent, disinterested expert witnesses to establish that the testing performed at the MSP lab was accurate.

However, a trial court's decision whether to admit evidence is discretionary and will be reversed only where there is a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion will be found only if an unprejudiced person, considering

the facts upon which the trial court acted, would say there was no justification or excuse for the ruling made. *People v Gould*, 225 Mich App 79, 88; 570 NW2d 140 (1997).

Furthermore, courts may take judicial notice of the reliability of the RFLP method of DNA testing. *Adams*, *supra* at 277; see also *People v Leonard*, 224 Mich App 569, 590-591; 569 NW2d 663 (1997) (the RFLP method of DNA analysis has been established as accepted in the scientific community). Contrary to defendant's argument, the prosecutor is not required to submit independent, expert testimony from scientists not associated with the police lab that conducted the RFLP analysis at issue in order to establish that the tests conducted by that particular police lab are generally reliable. Instead, the prosecutor must establish that the laboratory followed generally accepted laboratory procedures in conducting the particular RFLP analysis at issue. *Adams*, *supra*. Because the record in this case indicates that no dispute exists over the testing protocol, independent validation of the testing protocol is not required. *Leonard*, *supra* at 590. The prosecution's expert witness was an experienced DNA analyst. He testified that the laboratory followed the RFLP testing protocol as formulated by the FBI, honed at the MSP lab, and generally accepted by scientists as the standard RFLP analysis protocol. In addition, he gave a detailed description of the testing protocol, which matched the standard RFLP testing protocol described in *Adams*, *supra* at 270-277, and was found by the Court to be the generally accepted method of RFLP analysis, *id.* at 277. The trial court properly admitted the results of the DNA analysis.

Defendant next argues that the trial court should have granted his motion for a directed verdict of acquittal at the close of the prosecutor's proofs. In his brief he notes that if the DNA evidence and the hearsay evidence were excluded, then the trial court should have granted his motion for a directed verdict. Because we have found that both types of evidence were properly admitted, defendant's argument must fail. Therefore, the trial court's denial of defendant's motion was proper.

Lastly, defendant contends that his ten- to twenty-year sentence of imprisonment is disproportionate because he was forty-nine years old at the time of the offense and had no prior criminal record, as well as a twenty-eight year history of gainful employment at General Motors. We disagree.

We review the trial court's sentencing decision to determine whether the trial court abused its discretion in imposing the sentence. *People v Castillo*, 230 Mich App 442, 447; 584 NW2d 606 (1998). We will find an abuse of discretion where the sentence imposed does not reasonably reflect the seriousness surrounding the offender and the offense. *Id.* As the trial court noted, defendant violently raped a young girl, twice penetrating her. Moreover, before the rape, defendant humiliated the victim by forcing her to wear lingerie in his presence and watch a pornographic movie. Defendant showed absolutely no remorse for his offense, which the trial court properly considered in imposing sentence. See *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995). The significance of defendant's clean record and his history as a good employee pales in comparison to the heinousness of his crime. We conclude that defendant's ten- to twenty-year sentence is not disproportionate to the circumstances surrounding the offender and the crime.

Finally, because there was testimony that defendant penetrated the victim twice during the offense, the trial court properly exercised its discretion in scoring twenty-five points for offense variable twelve. *People v Dilling*, 222 Mich App 44, 54; 564 NW2d 56 (1997).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Martin M. Doctoroff
/s/ Peter D. O'Connell

[1] The state constitution's equal protection provision is coextensive with the federal constitution's Equal Protection Clause. *Harville v State Plumbing and Heating, Inc*, 218 Mich App 302, 310; 553 NW2d 377 (1996).

[2] The prosecutor also exercised a peremptory challenge to exclude an additional male juror after the trial court ruled that there had been no intentional discrimination against males during voir dire. Defendant did not object to the exclusion of this juror or otherwise argue in the court below that this exclusion was the product of intentional discrimination. We will not discuss exclusion of this juror. See *People v Vaughn*, 200 Mich App 32, 40; 504 NW2d 2 (1993) ("[U]nless it is clear from the record that the prosecution is using its peremptory challenges in a discriminatory fashion, a defendant who fails to raise the issue or otherwise develop a factual record of objections forfeits appellate review of the issue.").