# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>February 26, 1999 |
| v | No. 196981<br>Recorder's Court |
| ERVIN DEWAIN MITCHELL, JR.,<br><br>Defendant-Appellant. | LC No. 95-009149 |

Before: Cavanagh, P.J., and Holbrook, Jr., and Whitbeck, JJ.

PER CURIAM.

Defendant was convicted of three counts of first-degree criminal sexual conduct (CSC), MCL 750.520(b)(1)(f); MSA 28.788(2)(1)(f), and one count of assault with intent to commit great bodily harm, MCL 750.84; MSA 28.279. The trial court sentenced defendant to forty to sixty years' imprisonment on each of the CSC convictions and 6-½to ten years' imprisonment on the assault conviction. Defendant appeals as of right. We affirm.

I

Defendant first argues that the Washtenaw County search warrant should not have been approved because "Michigan's statutory scheme only authorizes bodily-intrusion search warrants of human beings who are victims of crime." This claim is not preserved for appellate review because it was not raised in the trial court. However, we will briefly consider the claim because it involves a question of law and the facts necessary for its resolution have been presented. See *Poch v Anderson*, 229 Mich App 40, 52; 580 NW2d 456 (1998).

Defendant bases his argument on Michigan's search warrant statute, MCL 780.651 *et seq*.; MSA 28.1259(1) *et seq*. Defendant contends that § 2 of the statute only allows the search and seizure of any "property or other thing," which defendant asserts does not include blood samples. We disagree. This Court has held that the language of a prior version of the statute permitting the issuance of a search warrant "to search the house, building or other location or place where the *property or thing* which is to be searched for and seized is situated" is "sufficiently broad to cover the search of persons for blood and hair samples." *People v Marshall*, 69 Mich App 288, 300, n 23; 244 NW2d

451 (1976) (emphasis added). The Legislature is presumed to act with knowledge of appellate court statutory interpretations. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 505-506; 475 NW2d 704 (1991). Thus, in the absence of any express language indicating otherwise, it can be presumed that the Legislature intended to include blood samples in the reach of MCL 780.652; MSA 28.1259.[1]

II

Defendant next claims that the trial court's failure to order Wayne County to reimburse appellate counsel for the transcript of the Washtenaw County suppression hearing denied him his rights to due process and equal protection. We disagree. Once it was determined in the Washtenaw County proceedings that defendant's blood sample was constitutionally obtained, defendant was collaterally estopped from relitigating the issue in Wayne County. Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment, and the issue was actually and necessarily determined in that prior proceeding. *People v Gates*, 434 Mich 146, 154; 452 NW2d 627 (1990). Because prosecutors are creatures of the same sovereign, they are the same party for purposes of collateral estoppel. *Id*. at 156. As defendant was collaterally estopped from relitigating the propriety of the seizure of the blood sample in Wayne County, the trial court did not err in denying defendant's request to be reimbursed for the cost of obtaining the Washtenaw County transcripts.

III

Defendant next asserts that he was denied the effective assistance of counsel at trial. A defendant that claims that he has been denied the effective assistance of counsel must establish that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

A

Defendant first argues that trial counsel was ineffective for failing to seek suppression of defendant's blood sample. However, as discussed in the previous issue, once the Washtenaw court determined that the search warrant was not defective and the seizure of the blood sample did not violate defendant's constitutional rights, defendant was collaterally estopped from relitigating the issue in Wayne County. Defense counsel was not required to raise a meritless motion. See *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

Defendant asserts that collateral estoppel does not apply here because defense counsel ineffectively contested the issue in Washtenaw County. Defendant contends that "the search warrant and affidavit were palpably insufficient." However, the record in the instant case reveals that defense

counsel made two motions to suppress in Washtenaw County, both of which were denied. Moreover, after reviewing the search warrant and accompanying affidavit, we conclude that a reasonably cautious person could have concluded that, under the totality of the circumstances, there was a substantial basis for the magistrate's finding of probable cause. See *People v Darwich*, 226 Mich App 635, 636-637; 575 NW2d 44 (1997). Thus, we find no reasonable probability that differing conduct by defense counsel in Washtenaw County would have changed the decision on the suppression motion or the outcome of this case. See *Pickens, supra*.

B

Next, defendant contends that trial counsel was ineffective for failing to move for dismissal under the 180-day rule, MCL 780.131(1); MSA 28.969(1)(1). We disagree. The 180-day rule does not require that trial commence within 180 days. Rather, if apparent good-faith action is taken well within that period, and the prosecutor proceeds promptly toward readying the case for trial, the rule is satisfied. MCR 6.004(D); *People v Bell*, 209 Mich App 273, 278; 530 NW2d 167 (1995). A trial court's attribution of delay is reviewed for clear error. *People v Crawford*, ___ Mich App ___; ___ NW2d ___ (Docket No. 200722, issued 11/20/98), slip op p 2.

In asserting that the 180-day rule was violated, defendant merely states that his trial occurred more than 180 days after he was convicted in the Washtenaw County case, and the prosecutor was aware of the Washtenaw County proceedings. Defendant offers no reason to conclude that the trial court's finding that the prosecutor proceeded promptly toward readying the case for trial is clearly erroneous. Accordingly, defense counsel was not ineffective for failing to move for dismissal because of a violation of the 180-day rule. See *Torres, supra*.

C

Defendant next maintains that trial counsel was ineffective for failing to challenge the prosecutor's failure to provide the defense with Freddie Triplett's autorads. Defendant alleges that this evidence was favorable to him, but does not provide any support for this assertion. Because defendant has failed to show that a reasonable probability exists that, if defense counsel had insisted on the production of Triplett's autorads, the outcome of the proceedings would have been different, he has not established that counsel was ineffective. See *Pickens, supra*.

D

Defendant next argues that trial counsel was ineffective for failing to present witnesses and seek an instruction regarding the unreliability of identification testimony. The decision whether to call witnesses is a matter of trial strategy. In order to overcome the presumption of sound trial strategy, the defendant must show that his counsel's failure to call these witnesses deprived him of a substantial defense that would have affected the outcome of the proceeding. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Here, where the prosecution conceded that the complainant had initially identified someone else as her assailant and the DNA evidence virtually excluded the possibility that someone other than defendant had assaulted the complainant, counsel's failure to present evidence or to

request additional instructions regarding misidentification did not deprive defendant of a substantial defense that would have affected the outcome of the proceeding. See *id*.

E

In his final claim of ineffective assistance of counsel, defendant maintains that defense counsel was ineffective for failing to object to "profile" evidence during the testimony of emergency room nurse Susan Nagy. Defendant contends that the testimony constitutes inadmissible profile evidence because "[t]he prosecutor was effectively eliciting testimony from the nurse that *any* behavior the complainant exhibited would be consistent with having been sexually assaulted." However, contrary to defendant's argument, Nagy did not testify that any behavior the complainant displayed would be consistent with a sexual assault, but rather that the reactions of rape victims vary. This testimony does not constitute inadmissible profile evidence.[2] In any case, defendant's claim of ineffective assistance of counsel fails because he has not established that if counsel had objected to this testimony, the outcome of the proceedings would have been different. See *Pickens, supra*.

IV

Defendant next asserts that the trial court erred in allowing Nagy to relate statements made by the complainant regarding the circumstances of the attack. The decision whether to admit or exclude evidence is within the trial court's discretion. This Court will find an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there is no justification or excuse for the ruling made. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

After reviewing Nagy's testimony, we find no error requiring reversal. The trial court sustained defense counsel's objection to Nagy repeating statements that the complainant had made describing the details of the attack. The complainant's statements regarding being struck on the head, vaginally raped, and anally probed were admissible as statements made for the purpose of medical treatment. See MRE 803(4). Nagy's testimony relating the description the complainant gave of her attacker was inadmissible hearsay; however, the error was harmless in light of the fact that the complainant had already provided the same information during her own testimony. See *People v Van Tassel (On Remand)*, 197 Mich App 653, 655; 496 NW2d 388 (1992).

V

Defendant maintains that the trial court erred in allowing the admission of medical records into evidence under the business records exception to the hearsay rule. When the prosecutor moved to admit the hospital records at trial, defense counsel objected on the basis that the records contained inadmissible hearsay and irrelevant information. To preserve an evidentiary issue for appellate review, a party must make a timely objection at trial, specifying the same ground for objection as is asserted on appeal. *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992). Accordingly, this issue is not preserved for appellate review.

Even if this issue were preserved, an adequate foundation was laid for the admission of the hospital records under MRE 803(6). Nagy's testimony established that in May 1993 she was the assistant manager of the emergency room and that records of treatment were kept in the ordinary course of hospital business. Nagy identified the documents in the proposed exhibit as written by herself, the doctor, or another nurse. Contrary to defendant's argument, Nagy's testimony did not demonstrate uncertainty as to whether all the records were there.

VI

Defendant contends that the trial court erred in allowing the complainant's mother and a police officer to recount statements made by the complainant describing the assault. The decision whether to admit or exclude evidence is within the trial court's discretion. *Ullah*, *supra*.

Defendant objected to the testimony of the complainant's mother. The trial court ruled that the statements were admissible under the excited utterance exception to the hearsay rule, MRE 803(2). In order for a statement to be admissible under this exception, (1) there must be a startling event, and (2) the resulting statement must be made while under the excitement caused by the event. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). The focus of the excited utterance rule is the lack of capacity to fabricate, not the lack of time to fabricate. *Id*. at 551.

The complainant's mother testified that the complainant left for a walk and came back approximately forty-five minutes later. The complainant did not join the family upon her return, but went to the back of the house and called for her mother. The complainant appeared "very upset, very agitated . . . . [I]t was like she was crying but she wasn't making any sound." When her mother asked what was wrong, the complainant paced back and forth and had difficulty expressing herself. Eventually, the complainant stated that she had been raped. Considering this testimony, we conclude that the trial court did not abuse its discretion in admitting the testimony of the complainant's mother under the excited utterance exception to the hearsay rule.

Because defendant did not object to the admission of the police officer's testimony below, this Court will review this issue only for manifest injustice. *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998). After reviewing the testimony, we find no manifest injustice. The police officer testified that the complainant had told him that she had been sexually assaulted, that she had been struck in the head with a board, and that the complainant gave him a description of her attacker, without specifying what the description had been. Read in context, the testimony was clearly elicited for the purpose of explaining the subsequent actions taken by the officer, such as returning to the scene to locate any retrievable evidence, and thus did not constitute inadmissible hearsay. See MRE 801(c). Moreover, we find no manifest injustice because at trial defendant did not dispute that the complainant had been raped; he merely argued that he had not been the assailant.

VII

Defendant next claims that the trial court's instruction on reasonable doubt was deficient because it failed "to adequately impress upon the jurors the need for moral certainty of guilt." The trial

court charged the jury using the reasonable doubt instruction found in the standard criminal jury instructions, CJI2d 3.2(3). Defendant did not object to this instruction at trial. Therefore, review is limited to the issue whether relief is necessary to avoid manifest injustice. See *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995).

Defendant argues that the instruction on reasonable doubt was fatally flawed because it failed to impress upon the jury that guilt has to be so certain that it is as strong as a moral certainty. However, the failure to include "moral certainty" language in the definition of reasonable doubt does not give rise to error warranting reversal. *People v Hubbard (after Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). Accordingly, there is no manifest injustice, and defendant is not entitled to any relief. See *Haywood*, *supra*.

VIII

Defendant next asserts that he was deprived of a fair trial because the prosecutor "went out of her way to elicit from more than one witness the fact that the complainant's family was in crisis and her grandfather was terminally ill." Defendant did not object to this alleged prosecutorial misconduct at trial.[3] To preserve for appeal an argument that the prosecutor committed misconduct during trial, a defendant must object to the conduct at trial on the same ground as he asserts on appeal. In the absence of a proper objection, review is precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996).

We find no error requiring reversal. The testimony regarding the complainant's family situation was relevant to explaining why she went out to the field by herself. The prosecutor did not place any undue emphasis on this testimony and did not mention it in her closing argument. The prosecutor did not ask the jury to suspend its judgment and decide the case on the basis of sympathy. See *People v Hoffman*, 205 Mich App 1, 21; 518 NW2d 817 (1994). Moreover, any prejudicial effect could have been eliminated by a curative instruction. See *Nantelle*, *supra*.

IX

Defendant's next claim is that the cumulative effect of errors denied him a fair trial. However, the only error that we have found occurred when Nagy testified as to the description the complainant gave of her attacker. As discussed in Issue IV, this constituted inadmissible hearsay. However, the error was harmless in light of the fact that the complainant had already provided the same information during her testimony, and there is no cumulative effect from a single error. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

X

In his final issue, defendant argues that his sentences are cruel and unusual because the maximums exceed his life expectancy. A trial court's imposition of a particular sentence is reviewed on appeal for an abuse of discretion, which will be found where the sentence imposed does not reasonably

reflect the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990); *People v Castillo*, 230 Mich App 442, 447; 584 NW2d 606 (1998).

Defendant relies on *People v Moore*, 432 Mich 311; 439 NW2d 684 (1989). However, *Moore* was decided before *Milbourn, supra*, and *People v Merriweather*, 447 Mich 799; 527 NW2d 460 (1994), which provide the standards for reviewing a sentence on appeal. *People v Lemons*, 454 Mich 234, 257; 562 NW2d 447 (1997). There is no basis in *Milbourn* for a requirement that the trial court tailor every defendant's sentence in relationship to his age. *Id*. at 258. Under *Milbourn*, the key test is whether the sentence reflects the seriousness of the matter. *Id*. at 260. In the present case, defendant's sentences are proportionate to the seriousness of the circumstances surrounding the offense and the offender. See *id*.; *Milbourn, supra* at 636.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Donald E. Holbrook, Jr.
/s/ William C. Whitbeck

[1] In criminal sexual conduct cases, search warrants seeking hair, tissue, blood, or other fluid samples are now expressly authorized by MCL 780.652a; MSA 28.1259(2a), which took effect June 1, 1996.

[2] Even if the testimony were considered profile evidence, *People v Hubbard*, 209 Mich App 234, 241; 530 NW2d 130 (1995), relied on by defendant, stands only for the proposition that drug profile evidence is not admissible as substantive evidence of guilt.

[3] Three witnesses mentioned the complainant's family situation in their testimony: the complainant herself, her mother, and Nurse Nagy. Defendant did not object to the testimony of the complainant or her mother. Defendant did object to the testimony of Nurse Nagy, as described in Issue IV, but on the basis that it was inadmissible hearsay, not that the prosecutor was improperly attempting to inject sympathy for the victim.