

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARLOS<sup>1</sup> SHANE SANCHEZ,

Defendant-Appellant.

---

UNPUBLISHED

March 26, 1999

No. 205427

Saginaw Circuit Court

LC No. 96-013250 FC

Before: Cavanagh, P.J., and MacKenzie and McDonald, JJ.

PER CURIAM.

Defendant was convicted following a jury trial of one count of kidnapping, MCL 750.350; MSA 28.582, four counts of first-degree criminal sexual conduct (CSC), MCL 750.520b; MSA 28.788(2), one count of assault with intent to commit CSC, MCL 750.520g(1); MSA 28.788(7)(1), and one count of second-degree CSC, MCL 750.520c; MSA 28.788(3). The trial court sentenced defendant as an habitual offender, third offense, MCL 769.11; MSA 28.1083, to concurrent terms of fifty to seventy-five years' imprisonment for the kidnapping, CSC I, and assault convictions, and ten to twenty years' imprisonment for the CSC II conviction. Defendant appeals as of right. We affirm.

I

Defendant first argues that the trial court erred in denying his motion for a mistrial based on the trial judge's alleged biased questioning of the complainant. We review the grant or denial of a mistrial for an abuse of discretion, which will be found where the denial of the motion deprived the defendant of a fair and impartial trial. *People v Wolverson*, 227 Mich App 72, 75; 574 NW2d 703 (1997).

The trial court may question witnesses in order to clarify testimony or elicit additional relevant information. MRE 614(b); *People v Conyers*, 194 Mich App 395, 404; 487 NW2d 787 (1992). However, the trial court must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial. The test is whether the court's questions and comments may have caused the jury to question the witness' credibility or the court's impartiality. *Id.* at 405.

Defendant contends that the judge's comments to the complainant that she had been a prosecutor for ten years and that the complainant's aunt would be near as the complainant testified "could not help but convey an impression to the jury that she favored the prosecutor's case." However, we fail to see how the jury could have been influenced by the comments, as it was not present when they were made.

Defendant also asserts that the trial judge's questioning of the complainant pierced the veil of judicial impartiality. However, after carefully reviewing the transcript, we find no error requiring reversal. The record reflects that the thirteen-year-old complainant was crying and unable to answer at times, and in addition that she was intimidated by all the people in the courtroom. When the witness became unresponsive to the prosecutor's questions, the trial court stepped in. The court's questioning was limited in scope and in length, did not demonstrate partiality, and elicited relevant information. See *Conyers, supra* at 404-405. Furthermore, the trial court instructed the jury that its comments and questions were not evidence or indicative of its personal opinion of the merits of the case. Cf. *People v Gratton*, 107 Mich App 478, 482; 309 NW2d 609 (1981).

Defendant stresses that through the court's questioning, the elements of CSC I were established. However, both before and after the court's questioning, the prosecutor elicited testimony regarding the elements of the other six charged offenses. Under the circumstances, we cannot find that the court improperly invaded the role of the prosecutor. See *People v Ross*, 181 Mich App 89, 91; 449 NW2d 107 (1989).

## II

Defendant next argues that the trial court abused its discretion in denying defendant's request to remand the case for a preliminary examination. On the day of trial, defense counsel claimed that, due to the multiple counts and the complexity of the case, he did not have an adequate understanding of the charges.

The right to a preliminary examination is established by statute, rather than any federal or state constitutional requirement. *People v Hunt*, 442 Mich 359, 362; 501 NW2d 151 (1993). If a defendant waives his right to a preliminary examination without the benefit of counsel, the court may remand the case in its discretion. MCL 767.42(1); MSA 28.982(1). In the instant case, defendant was represented by counsel when he waived his right to a preliminary examination. Defense counsel conceded that the preliminary examination was waived in hopes of securing a better plea agreement by eliminating the need for the complainant to testify. Under the circumstances, the trial court did not abuse its discretion in denying defendant's request for a remand on the day of trial. See *People v Skowronek*, 57 Mich App 110, 115; 226 NW2d 74 (1974).

## III

Defendant argues that the trial court erred in denying defendant's motion for a mistrial after a witness referred to the residents of the house where the assault occurred as "Mexican gang bangers." We review a trial court's denial of a motion for a mistrial for an abuse of discretion. *Wolverton, supra*.

Generally, an unresponsive, volunteered answer that injects improper evidence into a trial is not a ground for a mistrial unless the prosecutor knew in advance that the witness would give the unresponsive testimony or the prosecutor conspired with or encouraged the witness to give that testimony. *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). Although defendant asserts that the prosecutor's action was deliberate, he provides no evidence to contradict the trial court's contrary finding.<sup>2</sup>

Furthermore, the witness stated only that a neighbor had told her that there were "a bunch of Mexican gang bangers" in the house where the assault took place.<sup>3</sup> The neighbor himself testified that he had only visited the house once, he had not been upstairs where the assault occurred, and he was not acquainted with defendant. There was no evidence presented that defendant lived at the house. Although defendant maintains that the prosecutor engaged in "a deliberate and concerted effort" to inject prejudicial material into the proceedings, he provides no additional examples of such misconduct. Under the circumstances, we conclude that the single reference to "Mexican gang bangers" did not deprive defendant of a fair and impartial trial. Accordingly, the trial court did not abuse its discretion in denying the motion for a mistrial.<sup>4</sup> See *Wolverton*, *supra*.

#### IV

Defendant next raises several claims of prosecutorial misconduct. When reviewing instances of alleged prosecutorial misconduct, this Court must examine the pertinent portion of the record and evaluate the prosecutor's remarks in context. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Green*, 228 Mich App 684, 692-693; 580 NW2d 444 (1998).

#### A

Defendant argues that the prosecutor committed misconduct by referring to anal penetration in his opening statement and then producing no evidence on the charge of anal penetration at trial. We disagree.

Where a prosecutor states that evidence will be presented to the jury which is not in fact presented at trial, reversal is not required absent a showing of bad faith on the part of the prosecutor or prejudice to the defendant. *Wolverton*, *supra* at 77. In the instant case, contrary to defendant's argument, the prosecutor stated only that defendant "attempted to penetrate [the complainant] anally." The complainant's testimony supported this statement. Because the evidence presented at trial supported the prosecutor's statement, there was no prosecutorial misconduct.

#### B

Next, defendant argues that the prosecutor committed misconduct by moving to amend the information to omit alternate CSC theories. Again, we disagree. A court may – before, during, or after trial – permit the prosecutor to amend the information unless the proposed amendment would unfairly surprise or prejudice the defendant. MCL 767.76; MSA 28.1016; MCR 6.112(G); *People v*

*Goecke*, 457 Mich 442, 457; 579 NW2d 868 (1998). Defendant has failed to adequately explain how he was unfairly surprised or prejudiced by the dismissal of the alternate CSC theories. Accordingly, we find no error.

C

In addition, defendant claims that the prosecutor improperly failed to investigate and develop physical evidence. Defendant failed to preserve this issue for review by raising it below. See *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). In any case, we find no error. This Court has held that there is a distinction between the failure to develop evidence and the failure to disclose evidence. See *People v Vaughn*, 200 Mich App 611, 619; 505 NW2d 41 (1993), rev'd in part on other grounds 447 Mich 217; 524 NW2d 217 (1994); *People v Stephens*, 58 Mich App 701, 705; 228 NW2d 527 (1975). In the instant case, defendant admitted to the police that he picked the victim up and had sexual intercourse with her; defendant's mistaken identity defense was not advanced until trial, and thus the need for testing was not apparent. Defendant relies on *People v Jordan*, 23 Mich App 375; 178 NW2d 659 (1970); however, unlike the defendant in *Jordan*, defendant did not object to the admission of the physical evidence because of the failure to perform scientific testing. See *id.* at 385.

Affirmed.

/s/ Mark J. Cavanagh  
/s/ Barbara B. MacKenzie  
/s/ Gary R. McDonald

<sup>1</sup> Defendant testified at trial that the correct spelling of his name is "Carlo."

<sup>2</sup> The witness had not previously testified in defendant's case because defendant waived his preliminary examination.

<sup>3</sup> The trial transcript contains the following passage:

Q. And what did Mr. Moore say about – after hearing this?

A. Well, he had been thinking – you know, he was thinking about it, and then he told me, he said, there's a house right down here on the corner just like you're describing, and the walls are just empty, and he says – do you want me to say the words he said?

Q. Sure.

A. Well, he said there was a bunch of Mexican gang bangers down there. He said he was down there one time, and he got out as quick as he could. He said that they were bad.

<sup>4</sup> The trial court offered to give a curative instruction. However, defense counsel subsequently stated that he had discussed the issue with defendant, and they had decided against requesting an instruction because they did not want to emphasize the reference.