

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NEWELL ELLERY MCGATH,

Defendant-Appellant.

UNPUBLISHED

March 30, 1999

No. 205735

Genesee Circuit Court

LC No. 96-054719 FH

Before: Neff, P.J., and Kelly and Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of third-degree criminal sexual conduct, MCL 750.520d; MSA 28.788(4). He was sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to concurrent terms of twenty to forty years' imprisonment. He appeals as of right. We affirm.

Defendant's convictions stem from his alleged forcible sexual acts resulting in penetration on February 3, 1996. Defendant admitted engaging in both fellatio and vaginal intercourse with the victim, which he claimed was consensual, but denied engaging in anal intercourse. Defendant also denied being the source of certain injuries to the victim's breasts, but conceded in his trial testimony that he had performed acts during the course of consensual sex that could have caused those injuries.

I

On appeal, defendant first contends that the trial court's exclusion of a statement in the victim's medical report, which indicated that January 30, 1996, was the victim's last date of coitus preceding the February 3, 1996 incident, deprived him of his constitutional rights to due process, to confront witnesses and to present a defense. Defendant argues that the proffered evidence of the prior date of coitus may have exculpated him by demonstrating another possible source for the victim's injuries. We disagree.

This case is distinguishable from *People v Haley*, 153 Mich App 400; 395 NW2d 60 (1986), because here defendant was essentially requesting that the jury be allowed to speculate about what

might have happened during the prior January 30, 1996, incident. No offer of proof was made regarding the details of the January 30, 1996, incident. Thus, contrary to defendant's claim on appeal, the proffered evidence would not have permitted the jury to infer that the victim engaged in anal intercourse with someone else on an earlier occasion. Coupled with the medical testimony that these types of injuries usually heal within twelve to twenty-four hours and the absence of evidence that the victim had any condition that would delay the healing process, we hold that defendant failed to satisfy the materiality component of relevant evidence, that is, that the proffered evidence (the prior January 30 date of coitus) relate to a fact of consequence to the action (e.g., did anal penetration occur on February 3). See *People v Brooks*, 453 Mich 511, 515-516; 557 NW2d 106 (1996) (discussing the materiality and probative force elements of relevancy under MRE 401).

Similarly, the proffered evidence would not have permitted the jury to infer that the victim sustained breast injuries on January 30, 1996. Coupled with the medical testimony that the injuries should have been a little "yellowed" if they occurred before February 3, we find that defendant did not establish the materiality component of relevancy, that is, that the proffered evidence (the prior January 30 date of coitus) relate to a fact of consequence to the action (e.g., did defendant act forcefully on February 3). Moreover, even if the proffered evidence arguably had some marginal relevancy, we would hold that the trial court did not abuse its discretion in excluding the evidence when balancing other interests in the criminal trial process. The proffered evidence of the prior date of coitus was not necessary to preserve defendant's right to confrontation or to otherwise present a defense to the charges of forcible penetration. *People v Adair*, 452 Mich 473, 485; 550 NW2d 505 (1986); *People v Byrne*, 199 Mich App 674, 678-679; 502 NW2d 386 (1993).

II

Defendant next contends that he was convicted on the basis on improperly admitted and unduly prejudicial "other bad acts" evidence and argument regarding those other acts. We disagree.

To the extent that defendant claims evidentiary error, he has not preserved his claim for appellate review because it was not raised at trial. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). See also MRE 103(d). Further, we are not persuaded that manifest injustice would occur if we decline to review this evidentiary issue, given the well settled rule that evidence of a defendant's flight and other conduct indicative of consciousness of guilt is admissible in Michigan. See *People v Lewis*, 264 Mich 83, 89-90; 249 NW 451 (1933); *People v Coleman*, 210 Mich App 1, 4-5; 532 NW2d 885 (1995); *People v Lytal*, 119 Mich App 562, 575; 326 NW2d 559 (1982). Defendant's reliance on MRE 404(b) is misplaced because evidence admissible for one purpose is not inadmissible because its use for a different purpose is precluded. *Coleman, supra* at 4-5.

Defendant's alternative claim that his attorney's failure to object to the evidence constituted ineffective assistance of counsel is not properly before us because it is not raised in the statement of this issue. *Meagher v McNeely & Lincoln, Inc*, 212 Mich App 154, 156; 536 NW2d 851 (1995); *People v Yarger*, 193 Mich App 532, 540 n 3; 485 NW2d 119 (1992). We would find, however, that the existing record does not support defendant's claim of ineffective assistance of counsel. *People*

v Mitchell, 454 Mich 145, 164; 560 NW2d 600 (1997); *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994).

Finally, to the extent defendant claims that the prosecutor improperly referred to evidence of flight in her opening statement and closing argument, we hold that defendant has not established a miscarriage of justice warranting relief. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Examining the challenged remarks in context, we are unpersuaded that the prosecutor referred to evidence of flight for an improper purpose. Nor are we persuaded that it was improper for the prosecutor to use the word “stolen” when referring to the identification found on defendant at the time of his arrest. Moreover, even if improper, a timely objection and request for a cautionary instruction could have cured any prejudicial effect. *Stanaway, supra* at 687. Defendant was not deprived of a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995); *People v Marji*, 180 Mich App 525, 536-537; 447 NW2d 835 (1989).

III

Defendant next contends that the prosecutor introduced improper rebuttal testimony on collateral matters in two instances. In both instances, however, the prosecutor made an offer of proof regarding the proposed testimony before questioning the witnesses and defendant's attorney did not object to the evidence. Accordingly, appellate review of these issues is precluded absent manifest injustice. *People v Wilson*, 196 Mich App 604, 609; 493 NW2d 471 (1992). Relief will not be granted if a timely objection by defense counsel to the alleged improper questioning could have cured any prejudice, either by precluding such further questioning or by obtaining an appropriate cautionary instruction. *People v Badour*, 167 Mich App 186, 197; 421 NW2d 624 (1988), rev'd on other grounds 434 Mich 691 (1990).

Here, the first instance of alleged prosecutorial misconduct arises out of the prosecutor's introduction of a sheriff deputy's testimony to rebut another witness' denial, elicited by the prosecutor, that defendant had asked the witness to lie in court in order to provide him with an alibi. Although defendant contends that the prosecutor called this witness for the sole purpose of eliciting the denial, we find that the record establishes only that the prosecutor was surprised by the denial. Moreover, there is no record in support of defendant's claim that the prosecutor attempted to use the rebuttal testimony as substantive evidence. We are, thus, left with the issue whether the prosecutor's conduct in introducing the rebuttal testimony, consistent with its offer of proof, warrants relief under the standards for unpreserved claims of prosecutorial misconduct.

We hold that defendant has demonstrated no basis for relief, because the challenged evidence did not pertain to a central issue in the case. *Stanaway, supra* at 695. See also *People v Kilbourn*, 454 Mich 677, 683; 563 NW2d 669 (1997). At best, the evidence pertained to the issue of defendant's consciousness of guilt. *Lewis, supra* at 89-90; *Lytal, supra* at 575. While consciousness of guilt was a relevant issue at trial, the other evidence of defendant's consciousness of guilt, namely, defendant's flight from jail and efforts to avoid detection, coupled with the fact that no alibi defense was presented, persuades us that defendant has not demonstrated manifest injustice. Appellate relief is also unwarranted because, even if the rebuttal testimony should have been excluded, a timely defense

objection to the proffered evidence, on a proper ground, could have cured any prejudice by precluding the rebuttal testimony. *Badour, supra* at 197. Thus, the prosecutor's conduct did not deprive defendant of a fair and impartial trial. *Paquette, supra* at 342.

The second instance of alleged prosecutorial misconduct arises out of the prosecutor's introduction of an attorney's testimony to rebut defendant's testimony that the reason he absconded from jail was that he became scared when his former attorney told him that he would be convicted and serve fifteen to thirty years in prison. Defendant contends that the rebuttal evidence was improper because it related to a collateral matter. We find, however, that manifest injustice has not been shown because the rebuttal evidence contradicted defendant's own testimony on a relevant issue, namely, whether his flight was attributable to consciousness of guilt, and did not involve impeachment on a collateral matter. *People v Figgures*, 451 Mich 390, 398-399; 547 NW2d 673 (1996); *People v Bennett*, 393 Mich 445, 449; 224 NW2d 840 (1975). Furthermore, appellate relief of this unpreserved claim of prosecutorial misconduct is precluded because, even assuming that the rebuttal testimony could have been excluded, a timely defense objection to the prosecutor's offer of proof could have precluded the questioning.

Defendant's alternative claim that his attorney's failure to object to the evidence constituted ineffective assistance of counsel is not properly before us because it is not raised in the statement of this issue. *Meagher, supra*; *Yarger, supra* at 540 n 3. Once again, however, the record does not support a claim of ineffective assistance of counsel. Neither deficient performance, under an objective standard of reasonableness, nor prejudice, is apparent from the record. *Pickens, supra* at 338; *People v Armendarez*, 188 Mich App 61, 74-75; 468 NW2d 893 (1991).

IV

Defendant next contends that the trial court improperly sentenced him on the basis of its belief that he was guilty of a higher offense than that for which he was charged and convicted. We disagree. Viewed in context, the trial court's remarks do not establish that it violated the principle that a sentencing court may not make an independent finding of guilt and then sentence a defendant on the basis of that finding. *People v Shavers*, 448 Mich 389, 393; 531 NW2d 165 (1995); *People v Dixon*, 217 Mich App 400, 410; 552 NW2d 663 (1996). We conclude that defendant has not demonstrated that his sentences are invalid. *In re Dana Jenkins*, 438 Mich 364, 369 n3; 475 NW2d 279 (1991).

V

Finally, we have considered the arguments raised by defendant in his pro se supplemental brief and find no basis for relief. The trial court did not preclude the defense from using the victim's prior inconsistent statements at the preliminary examination, or in Sergeant Saunders' report, for purposes of impeachment. Also, the trial court's separate ruling to disallow admission of the entire preliminary examination transcript was not an abuse of discretion. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994). Defendant did not meet his burden of establishing a proper foundation for introducing this exhibit evidence in its entirety. *People v Burton*, 433 Mich 268, 304 n 16; 445 NW2d 133 (1989). Further, we are not persuaded that the trial court abused its discretion in refusing to

reopen proofs to admit Sergeant Saunders' report containing the victim's statements. *People v Keeth*, 193 Mich App 555, 560; 484 NW2d 761 (1992). Apart from the untimely nature of the request, defendant failed to offer a proper foundation for admission of this exhibit evidence.

Limiting our review to the record, we also hold that defendant has failed to establish that he was deprived of ineffective assistance of counsel. *Pickens, supra*; *Armendarez, supra*. Defendant has not shown an actual conflict of interest adversely affecting his attorney's performance. *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998). Further, we are not persuaded that defendant's attorney failed to present impeachment evidence that might have affected the outcome of the trial. *People v Bass (On Rehearing)*, 223 Mich App 241, 253-254; 565 NW2d 897 (1997), vacated in part on other grounds 457 Mich 865 (1998). Lastly, a mere difference in opinion on trial tactics does not amount to ineffective assistance of counsel. *People v Stubli*, 163 Mich App 376, 381; 413 NW2d 804 (1987).

Finally, we hold that defendant has not established any basis for relief based on prosecutorial misconduct. *Stanaway, supra* at 687. Although a prosecutor may not knowingly use false testimony to obtain a conviction, *People v Wiese*, 425 Mich 448, 454; 389 NW2d 866 (1986), the record here does not support defendant's claim that his conviction was based on false testimony. At best, the record establishes a credibility issue that was resolved by the jury in favor of finding that the victim gave credible testimony on the issue of forcible sexual penetration. Further, the prosecutor's objections at the trial to the admission of the preliminary examination transcript and Sergeant Saunders' report did not constitute an improper suppression of evidence or otherwise violate defendant's due process rights. *People v Canter*, 197 Mich App 550, 568; 496 NW2d 336 (1992).

Affirmed.

/s/ Janet T. Neff
/s/ Michael J. Kelly
/s/ Harold Hood