

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NATHAN WILSON,

Defendant-Appellant.

UNPUBLISHED

June 25, 1999

No. 206973

Detroit Recorder's Court

LC No. 96-003331

Before: Gage, P.J., and White and Markey, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(c); MSA 28.788(2)(1)(c) (penetration during the commission of another felony), and MCL 750.520b(1)(e); MSA 28.788(2)(1)(e) (penetration while armed with a weapon), armed robbery, MCL 750.529; MSA 28.797 and carjacking, MCL 750.529a; MSA 28.797(a). The trial court sentenced defendant to serve thirty to fifty years' imprisonment on each of the CSC I convictions, ten to twenty years' imprisonment on the armed robbery conviction and fifteen to thirty years' imprisonment on the carjacking conviction. In this appeal as of right, defendant raises several issues. Because defendant's convictions and sentencing on two counts of CSC I arising from a single penetration violate double jeopardy, we remand to the trial court for modification of the judgment of sentence. In all other respects, we affirm.

The victim testified that defendant approached her with a knife, forced her into her car, took some of her possessions, directed her to drive to various locations, and then in a desolate park sexually assaulted her. After defendant completed the assault, he drove off in the victim's car. Defendant contends that he met the victim at a crack house and that they engaged in consensual sex, after which he admittedly drove off in the victim's car when she left the vehicle to find a bathroom.

Defendant first contends that he was denied the right to confront his accuser because he was unable to fully cross-examine the victim with respect to issues bearing on her credibility. On cross-examination, the victim testified that on the day of the assault she had a job as a secretary. When defendant asked the victim where she was employed, the court sua sponte instructed the witness not to answer the question. Defendant argues that the attempted inquiry was relevant to the victim's credibility

because she testified that defendant had stolen her food stamp identification card, yet she claimed to have gainful employment as a secretary.

The scope of cross-examination is within the trial court's discretion. *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1993). Neither the Sixth Amendment's Confrontation Clause nor due process confers on a defendant an unlimited right to cross examine on any subject. *Id.* Cross examination may be denied with respect to collateral matters bearing only on general credibility, as well as on irrelevant issues. *Id.* In this case, defendant was afforded great latitude in cross-examining the victim on issues related to her credibility. He thoroughly explored the victim's history of crack cocaine use and whether she was using drugs on the day of the assault. Defendant was also permitted to cross-examine the victim regarding whether she was employed and the general nature of her employment. That the victim claimed she was employed but had a food stamp identification card was brought before the jury. We therefore conclude that the trial court acted within its discretion in precluding defendant from delving into any greater detail regarding the victim's employment because any additional details regarding her job were simply collateral matters possibly affecting only the victim's general credibility.

Defendant next argues that the trial court erred in permitting Johnnie Watson to testify to defendant's participation in uncharged criminal acts. Two days after the assault, the police found Watson in possession of the victim's vehicle. Watson explained that he had obtained possession of the vehicle from defendant. He further testified that prior to getting the vehicle from defendant, he and defendant drove to a burned out, abandoned house where they found a television, which they eventually sold, splitting the proceeds. Watson then suggested that they were going to use the proceeds to purchase drugs. While the fact that Watson obtained the vehicle from defendant was relevant to prove that defendant had possessed the victim's vehicle, the suggested criminal activities in which defendant and Watson engaged had absolutely no tendency to establish any fact material to defendant's crimes against the victim; nor were they necessary to establish that defendant had given Watson the vehicle. MRE 401; *People v Crawford*, 458 Mich 376, 383-385; 582 NW2d 785 (1998). Because Watson's and defendant's uncharged acts were irrelevant, the trial court abused its discretion in permitting Watson to testify with respect to the stolen television and proposed drug purchase. MRE 402; *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995). In light of the other evidence of defendant's guilt, however, we find it highly probable that the error did not affect the jury's verdict, and we therefore conclude that the trial court's error was harmless.¹ *People v Harris*, 458 Mich 310, 320; 583 NW2d 680 (1998).

Defendant also claims that the trial court failed to remain impartial when it improperly questioned him and commented during his testimony. Defendant first alleges that during defense counsel's redirect examination of defendant the court made a sarcastic remark that "communicated [its] negative assessment" of defendant's credibility. While defense counsel attempted to elicit defendant's denial that he had sexually assaulted the victim, the following exchange occurred:

Defense counsel: And try to rape her, did you? Or did you? Did you ever force yourself on her without her consent?

Defendant: No.

Defense counsel: Now, anyhow do you explain—

The Court: That doesn't have anything to do with force [sic] himself on her. It has to do with him forcing himself in her.

Defense counsel: Did you rape [the victim]?

Defendant: No, I did not.

Defendant was charged with CSC I, which required that the prosecutor prove that defendant penetrated the victim. See MCL 750.520b; MSA 28.788(2). Apparently, the trial court intended its remark to indicate that defense counsel's question whether defendant forced himself on the victim was irrelevant, and to clarify that the prosecutor had the distinct burden of proving penetration. Thus, we do not find that the trial court's remark constituted an improper assessment of defendant's credibility or was otherwise prejudicial to defendant.

Defendant additionally suggests that further court interrogation of him effectively questioned his credibility, improperly elicited the fact that he had been in jail, and improperly elicited unsworn testimony by the police officer in charge of investigating the case.² The principal limitation on a court's discretion over matters of trial conduct is that its actions not pierce the veil of judicial impartiality. *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996). Pursuant to MRE 614(b), a trial court may interrogate any witness. If a party takes issue with the court's questioning, he must object on the record at the time of the questioning or the next occasion the jury is absent from the courtroom. MRE 614(c).

Defendant failed to raise any objection; thus, his challenges to the trial court's questioning are unpreserved. Moreover, a review of the trial court's challenged remarks reveals no attempt by the court to destroy defendant's credibility. Because the trial court's questioning was posed in a neutral manner and merely clarified a minor issue, we find no misconduct. *Davis, supra*. Regarding defendant's argument that the trial court improperly elicited that he had been in jail, effectively clothing defendant in a prison uniform for the duration of the trial, given defendant's failure to object to the court's questioning in this respect and his failure to now allege any specific prejudice arising from the brief exchange between him and the court, we cannot conclude that the trial court deprived defendant of a fair trial. See *People v Herndon*, 98 Mich App 668, 673; 296 NW2d 333 (1980) (When defendant failed to develop a record showing he was prejudiced by his appearance in handcuffs before the jury, this Court held he was not denied his right to a fair and impartial jury). Finally, with respect to the trial court's solicitation of unsworn testimony, because defendant was unable to identify the police officer who took his custodial statement, the trial court simply asked the officer in charge if he knew the identity of the other officer. The officer in charge responded in the affirmative, but did not state the individual's name. Absolutely no indication exists, nor does defendant allege, that the court's two brief inquiries regarding the officer who took defendant's statement resulted in any prejudice to him. Thus, we conclude that none of the trial court's remarks that defendant failed to challenge at trial resulted in a miscarriage of justice. MCL 769.26; MSA 28.1096.

Defendant also contends that the trial court impaired his right of confrontation when it sua sponte instructed a subpoenaed witness, William Dixon, that he did not have to respond to the prosecutor's question whether Dixon ran a known drug house. Defendant argues that the trial court's admonition precluded him from establishing his defense that he met the victim at the drug house and that the victim voluntarily engaged him in a sex for drugs exchange. The record shows that the trial court simply advised the witness of his privilege against self-incrimination, specifically that his response to the question posed could lead to prosecution. In any event, the record also reveals that Dixon did respond (negatively) to the question. Furthermore, because defendant had been permitted to explore the victim's drug use through her own testimony and also questioned Dixon regarding whether the victim had used drugs while in his home, defendant was not deprived of the opportunity to present his desired defense. Accordingly, we find defendant's argument lacking in merit.

Next, defendant claims that the trial court erred in admitting DNA evidence when the prosecutor failed to first establish the general acceptance and reliability of DNA evidence. Because our review of the record reveals that both defense counsel and defendant himself stipulated to the admission of the DNA analysis report, however, defendant has waived our review of this argument. *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995) (A party cannot request a certain action of the trial court and then argue on appeal that the action was error).³

Next, defendant argues that his convictions on two counts of first-degree criminal sexual conduct violated double jeopardy. The Double Jeopardy Clauses restrict the courts from imposing more punishment than that intended by the Legislature. *People v Denio*, 454 Mich 691, 709; 564 NW2d 13 (1997). Defendant was charged with two counts of CSC I: sexual penetration with another under circumstances involving the commission of any other felony, MCL 750.520b(1)(c); MSA 28.788(2)(1)(c), and sexual penetration with another while armed with a weapon, MCL 750.520b(1)(e); MSA 28.788(2)(1)(e). The Michigan Legislature did not intend in enacting the CSC I statute that a single sexual penetration accompanied by more than one of the statute's enumerated circumstances should result in multiple criminal charges for purposes of conviction and sentencing. *People v Johnson*, 406 Mich 320, 331; 279 NW2d 534 (1979). Therefore, the trial court erred in imposing two separate, concurrent sentences on the basis of defendant's conviction arising from a single act of penetration. We thus remand to the trial court for an administrative modification of defendant's judgment of sentence to reflect that defendant's conviction is for one count and one sentence of CSC I supported by two separate theories. *People v Bigelow*, 229 Mich App 218; 581 NW2d 744 (1998).⁴

Lastly, defendant suggests that the cumulative effect of several errors denied him a fair trial. Because we found only one actual error that affected defendant's trial, specifically the trial court's admission of testimony of other acts engaged in by defendant, which error we determined

was harmless, we reject defendant's argument regarding cumulative error. *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995).

We remand for modification of defendant's judgment of sentence consistent with this opinion, and in all other respects we affirm.

/s/ Hilda R. Gage

/s/ Helene N. White

/s/ Jane E. Markey

¹ Furthermore, because this evidentiary error was harmless, defense counsel did not render ineffective assistance in failing to contest its admission or request a cautionary instruction. See *People v Mitchell*, 454 Mich 145, 157-158; 560 NW2d 600 (1997) (A defendant claiming ineffective assistance must show that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that but for the unprofessional errors the result of the proceeding would have been different.).

² Defendant testified at trial that certain discrepancies between his statement to the police and his trial testimony derived from the fact that the police had never told defendant at the time of his arrest who was the complaining witness. Defendant explained that portions of his statement to the police were based on events that occurred with a woman named Lisa, with whom defendant alleged that he had consensual sex within several days of the victim's rape. On cross-examination, the prosecutor asked defendant about his ability to contact Lisa and other individuals mentioned in defendant's statement to the police, apparently in an effort to highlight that defendant had not called as witnesses these individuals who could potentially corroborate defendant's version of events. Shortly thereafter, the trial court followed up on this line of questioning, which defendant now challenges.

The Prosecutor: They wasn't [sic] over there in 1300 [the police station] when you gave this statement either, were they?

Defendant: Nope.

* * *

Neither was my lawyer.

The Court: Did they tell you who—did you tell us who wrote the statement?

Defendant: To be honest with you I cannot because at the time I was not, like I said, my right state of mind because things were going on.

The Court: Is the person who wrote the statement here?

Defendant: No.

The Court: So the officer in charge is not the person who wrote the statement?

Defendant: I didn't never [sic] talk to him.

The Court: Do you know who you talked to?

Defendant: By face, no. All I know he was a slim white male about anywhere from ages of 28 to 32, 33. And, we was [sic] in 1300 Beaubien, the first room just before you get past the desk.

The Prosecutor: One other question, Judge. Oh, I'm sorry. Is the Court finish [sic]?

The Court: No. Investigator [Jenkins], do you know who he is talking about?

Investigator Jenkins: Yes, I do, your Honor.

The Court: Where is he?

Investigator Jenkins: He is right in the witness room.

The Court: When did you last talk with Lisa?

* * *

Defendant: The last I talked with her was that Saturday.

The Court: Sixteen months ago?

Defendant: Ha? Yes. That is the last time I talked to her because they won't let me use the phone.

The Court: Who wouldn't let you use the phone?

Defendant: Where I'm staying.

The Court: Where are you staying?

Defendant: In Wayne County Jail.

The Court: Have you talked to—who did you say your boy's name, Edward?

Defendant: Yes.

The Court: When's the last time you talked to him?

* * *

Defendant: Oh, the last time I talked to him was the night of the 6th of February. It was Tuesday.

The Court: Sixteen months ago?

Defendant: Yes.

The Court: Why haven't you talked to him—

* * *

Defendant: Because like I said, I don't have an address where he live [sic] and they won't let me use the phone.

³ Defendant also suggests that defense counsel rendered ineffective assistance in stipulating to the admissibility of the DNA report indicating that defendant was the source of a semen sample taken from the victim. Even assuming that defense counsel unreasonably stipulated to the report's admissibility, the stipulation could not have prejudiced defendant because defendant's theory of the case involved a consensual sexual encounter with the victim. *Mitchell*, note 1 *supra*.

To the extent defendant additionally alleges that his defense counsel was ineffective "for failure to offer an intoxication, and or, diminished capacity defense," defendant has failed to overcome the presumption of sound trial strategy in view of his claim of consensual intercourse.

⁴ In *Bigelow*, the defendant had been convicted of both first-degree premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a), and first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), arising from the death of a single victim. *Bigelow*, *supra* at 218. A conflict panel of this Court held that the appropriate remedy for this double jeopardy violation was modification of the defendant's judgment of conviction and sentence to specify that the defendant's conviction was for one count of first-degree murder supported by two theories. *Id.*