STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 30, 1999
v	No. 207250 Kalamazoo Circuit Court
JAMES EDWARD CHAMBERS, Defendant-Appellant.	LC No. 96 001177 FH

Before: McDonald, P.J., and Sawyer and Collins, JJ.

PER CURIAM.

Defendant was charged with three counts of third-degree criminal sexual conduct, MCL 750.520d(1)(b); MSA 28.788(4)(1)(b). Following a jury trial, he was convicted on two counts and acquitted on the third. The trial court sentenced defendant as an habitual offender, MCL 769.11; MSA 28.1083, to six to thirty years' imprisonment for each conviction. Defendant appeals as of right. We affirm.

Defendant was convicted for sexually assaulting his former girlfriend. The victim testified that on the morning of June 6, 1996, defendant followed her home from a substance abuse meeting they both attended, forced his way into her house as she entered, and sexually assaulted her, penetrating her vagina with both his fingers and penis. She further alleged that he returned that same night, again forcing his way into the house, and again sexually assaulting her. In addition to the victim's account of the events, the prosecution introduced testimony of the victim's daughter, who overheard her mother telling defendant to stop and observed defendant on top of her mother on a living room couch. Two of the victim's friends, Maria Garcia and Sharon Taylor, testified that they noticed defendant following them to her house as they drove home from the morning meeting, and that the victim told them of the sexual assault the next day. The prosecution did not introduce any testimony corroborating the alleged nighttime incident. Defendant testified at trial and denied that the assaults occurred. Defendant claimed that the victim and the other prosecution witnesses were lying and that the victim fabricated the charges after he spurned her to marry another woman. The defense also introduced the testimony of another of defendant's former girlfriends, who stated that the victim related the June 6 incident as only physical in

nature, not mentioning a sexual assault. The jury convicted defendant on the two counts arising from the morning incident, acquitting him of the alleged nighttime assault.

Defendant first argues the prosecution failed to introduce sufficient evidence to convict him of the crimes charged. We disagree. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could conclude that the elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

Defendant's arguments relate to the credibility of the victim and the other prosecution witnesses and the lack of physical evidence supporting the victim's account of the events. In evaluating the sufficiency of the evidence, this Court should not interfere with the jury's role of determining the weight of the evidence or the credibility of the witnesses. *Id.* at 514-515. We do not determine which testimony to believe, and instead resolve all conflicts in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Viewing the evidence in the light most favorable to the prosecution, the evidence was sufficient to support defendant's convictions for the morning assault. The fact that the jury did not convict defendant of the third charge for the alleged nighttime assault does not change our conclusion. A jury has the right to disregard all or part of a witness' testimony. *People v Goodchild*, 68 Mich App 226, 235; 242 NW2d 465 (1976).

Defendant next contends the trial court committed reversible error when it allowed the prosecution to present Taylor as a rebuttal witness. Defendant failed to object to this testimony below. Accordingly, he has waived appellate review of this issue absent manifest injustice. *People v Kelly*, 423 Mich 261, 281; 378 NW2d 365 (1985); *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). The evidence against defendant was sufficiently strong to convince us that manifest injustice is not present in this case. See *Asevedo, supra* at 398-399.

Defendant next argues that the prosecutor's comments during closing argument denied him a fair trial. We disagree. Defendant failed to object to the remarks at trial. The failure to object deprives the trial court of an opportunity to cure the error, and we will reverse only if a curative instruction could not have eliminated the prejudicial effect of the remarks or where the result would be a miscarriage of justice. *People v Messenger*, 221 Mich App 171, 179-180; 561 NW2d 463 (1997). Reversal is not warranted in this case.

The prosecutor did not express a personal opinion on the credibility of prosecution witnesses. Moreover, the prosecutor is permitted to argue from the facts that the defendant is not worthy of belief. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Finally, we find the prosecutor's remark that "according to [defendant], 'cuz he's such a hot catch," did not deny defendant a fair and impartial trial. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). We conclude that when placed in context, the prosecutor's remarks were appropriate responses to defendant's theory of the case that did not deny him a fair and impartial trial. There was no miscarriage of justice.

Finally, defendant claims he received ineffective assistance of counsel. Defendant's claim is based on counsel's failure to remove two jurors from the panel. The two jurors indicated during voir dire that they had brothers who had been sexually assaulted.[1] Because defendant did not move for a *Ginther*[2] hearing or a new trial based on ineffective assistance of counsel, our review is limited to mistakes apparent on the record. *People v McCrady*, 213 Mich App 474, 478-479; 540 NW2d 718 (1995).

We review an ineffective assistance of counsel claim to determine whether defendant has shown that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). To demonstrate ineffective assistance defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). He must also show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.*, at 687-688.

Defendant has failed to establish his claim of ineffective assistance. In *People v Robinson*, 154 Mich App 92, 94-95; 397 NW2d 229 (1986), this Court recognized that decisions on whether to accept or strike certain jurors are matters of trial strategy. It is well-established that this Court will not second-guess counsel on matters of trial strategy. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). In *Robinson, supra* at 95, after stating that research had not revealed any case in Michigan where defense counsel's failure to challenge a juror or jurors has been held to be ineffective assistance of counsel, this Court stated: "[w]e cannot imagine a case where a court would so hold, and we do not so hold in this case." We also decline to so hold in this case. This appeal does not present *Robinson*'s unimaginable case.

We also reject defendant's cursory argument that the trial court should have *sua sponte* excused the two jurors. Jurors are presumed to be competent and impartial, and the burden of proving otherwise is on the party seeking disqualification. *People v Walker*, 162 Mich App 60, 63; 412 NW2d 244 (1987). Defendant has failed to convince us that the jurors were incompetent or partial.

Affirmed.

/s/ Gary R. McDonald
/s/ David H. Sawyer
/s/ Jeffrey G. Collins

[1] The fact that the jurors had disclosed this information distinguishes this case from *People v DeHaven*, 321 Mich 327; 32 NW2d 468 (1948), *People v Hannum*, 362 Mich 660; 107 NW2d 894 (1961), and *People v Kage*, 193 Mich App 49; 483 NW2d 424, rev'd 439 Mich 1022 (1992), which defendant cites.

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).