STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THERON CHARLTON BRADLEY,

Defendant-Appellant.

UNPUBLISHED
December 3, 1999

No. 210248
Kalamazoo Circuit Court
LC No. 97-000674 FC

Before: Hood, P.J., and Holbrook, Jr. and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of kidnapping, MCL 750.349; MSA 28.581, three counts of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), and unarmed robbery, MCL 750.530; MSA 28.798. He was sentenced to prison terms of fifty-five to ninety years for the kidnapping and CSC convictions and ten to twenty years for the robbery conviction. Defendant appeals as of right. We affirm.

Defendant entered a gas station in Kalamazoo and told the victim that he was "holding up" the store. Defendant ordered the victim to give him the money from the cash drawer, then forced the victim to accompany him in his car. Over the next three hours, defendant committed at least three sex acts on the victim. Defendant eventually released the victim in Berrien County, where the victim ran to a nearby house and telephoned the police. The police subsequently found defendant in his car at the location he had released the victim. Defendant told the officers that the victim, who defendant implied was a prostitute that he had "picked up," voluntarily gave him money, accompanied him, and submitted to the sex acts.

Defendant first contends that the trial court abused its discretion in denying his motion for new trial on the ground that evidence that the victim was a virgin was improperly admitted for the purpose of refuting defendant's defense of consent. In *People v Bone*, 230 Mich App 699, 702; 584 NW2d 760 (1998), this Court held that evidence of a victim's virginity as circumstantial proof of the victim's unwillingness to consent to a sexual act is not admissible in a prosecution for criminal sexual conduct. In this case, the victim's testimony was clearly tied to the issue of consent and should not have been admitted. *Id.*

However, we find the error to be harmless. Error in the admission of evidence shall not be grounds for reversal unless it affirmatively appears that the error complained of resulted in a miscarriage of justice. MCL 769.26; MSA 28.1096. In applying this test, the reviewing Court shall not reverse unless the defendant can demonstrate that it is more probable than not that the outcome would have been different without the error. *People v Lukity*, 460 Mich 484, 495-496; ___ NW2d ___ (1999).

Defendant was charged with alternate theories of CSC, including (1) penetration during the commission of another felony, MCL 750.520b(1)(c); MSA 28.788(2)(1)(c); and (2) penetration through force or coercion with personal injury to the victim, MCL 750.520b(1)(f); MSA 28.788(2)(1)(f). Consent is not a defense when the act occurs during the commission of another felony. Further, the evidence of guilt was overwhelming. Defendant's entire defense was premised on the willingness of the victim to leave his place of employment and engage in sex acts with defendant. However, evidence was presented that the victim had never left the station unattended when he worked there, and police, medical personnel, and others testified that the victim was hysterical after he was released. The victim testified that defendant forced him to accompany him from the gas station and perform the sex acts. For the jury to believe defendant's defense, it would have had to conclude that the victim acted completely out of character on the night of the incident. In light of the evidence presented, we conclude that defendant failed to sustain his burden of showing that it is more probable than not that the outcome of the trial would have been different without the admission of the evidence.

Defendant next contends that he was denied effective assistance of counsel by defense counsel's failure to object to the testimony of two police witnesses who mentioned in passing that defendant had requested counsel. We disagree. During trial, the officers were asked if they interviewed defendant when they first encountered him. Both answered that they had not interviewed defendant because they had been told that he requested counsel. Neither statement about the request for counsel had been solicited by the prosecutor. At the hearing on the motion for new trial, defense counsel indicated that she had not objected because she felt the statements were not obvious and that she was trying to prevent opening the door to other damaging statements that the trial court had excluded. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy. See *People v Kvam*, 160 Mich App 189, 200; 408 NW2d 71 (1987), particularly where defense counsel determines that it is preferable not to object to improper remarks and call attention to them. *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995). Moreover, given the overwhelming evidence in this case, it is not likely that, but for counsel's failure to object, a different outcome would have resulted. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Affirmed.

/s/ Harold Hood
/s/ Donald E. Holbrook, Jr.
/s/ E. Thomas Fitzgerald