

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff- Appellee,

v

JAMES EDWARD MOORE,

Defendant-Appellant.

UNPUBLISHED

January 28, 2000

No. 203168

Calhoun Circuit Court

LC No. 96-003376-FC

Before: Whitbeck, P.J., and Hoekstra and Owens, JJ.

PER CURIAM.

A jury convicted defendant James Edward Moore of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2). The trial court sentenced Moore to fourteen to thirty years' imprisonment. Moore appeals as of right. We affirm Moore's conviction and sentence, but remand for recalculation of the amount of jail credit to which he is entitled.

I. Basic Facts And Procedural History

The victim in this case was ten years old at the time of the offense and eleven years old when she reported it to her mother, with whom Moore had a relationship. Because of that relationship, Moore also knew the victim's siblings and at times would take the children to restaurants, to the store, to the playground, and to his house.

The victim testified at trial that when she and Moore were alone, Moore would touch her breasts and inside her vagina. She said that Moore would lift up her shirt and start "messaging" with her and that he would go in her pants and stick his finger in her vagina. Ultimately, the victim reported this conduct her mother, who confronted Moore. He denied any inappropriate conduct but, shortly thereafter, he left the state for several years. A police investigation ensued and the prosecutor eventually charged Moore with two counts of CSC I for penetrating the victim's vagina with his finger and one count of CSC I for penetrating the victim's vagina with his penis. The prosecutor dismissed the charge of penile penetration as well as the second count of digital penetration before trial. Accordingly, the jury only considered whether Moore committed a single act of digital penetration when it found him guilty of that act.

II. Expert Witness Funds

A. Preservation And Standard Of Review

Moore argues that the trial court abused its discretion when it denied his motion for funds to obtain an expert witness to testify that he was incapable of some of the physical acts that the victim claimed he perpetrated. Moore had hoped that this evidence would discredit her testimony as a whole.

Moore moved the trial court to provide additional funds to pay for an expert witness and the trial court ruled on Moore's motion for funds. Therefore, this issue is preserved. *People v Phillips*, 217 Mich App 489, 492; 552 NW2d 487 (1996).

This Court reviews a trial court's denial of funds for an expert witness for an abuse of discretion. See *People v Dumont*, 97 Mich App 50, 55; 294 NW2d 243 (1980). Moore has the burden of establishing that the trial court's refusal to provide funds more probably than not affected the outcome of his trial. See *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

B. Cumulative Testimony

MCL 775.15; MSA 28.1252 permits a court to pay for an expert witness to testify on behalf of the defense. When Moore moved the trial court for funds to obtain an expert witness in this case there was a count pending against him for penile/vaginal penetration of the victim. Moore requested funds specifically to defend against that allegation by proving that he could not commit that act because he is a paraplegic and likely permanently impotent. The trial court denied the motion for funds, finding testimony by one doctor would provide sufficient evidence to defend against the charge. The trial court, however, granted Moore's request to take testimony by telephone from a physician in Virginia who had treated him. Additionally, the trial court informed Moore that he could subpoena a local doctor to testify at trial and agreed to reconsider the funds issue if producing the local doctor at trial required Moore to pay the physician above a "normal witness fee."

Moore chose not to subpoena a local doctor or take testimony by telephone. Instead, he had a local physician, Dr. Patrick Sweeney, prepare a report regarding his physical condition, which he introduced into evidence. Moore and the prosecutor also stipulated to the substance of the Virginia physician's testimony. Moore clearly presented the substance of the testimony that he complains an expert, hired with county funds, would have provided and cannot complain that he was unable to "safely proceed to trial" without this other expert witness. MCL 775.15; MSA 28.1252. Therefore, we hold that the trial court did not abuse its discretion by failing to provide funds for Moore to hire an expert to testify about his physical limitations.

III. The Sweeney Report And The Trial Court's Response

A. Overview

As noted above, Moore offered Dr. Sweeney's report into evidence at trial. The report detailed his paralysis and impotence, and also indicated that Moore was accused of sexual misconduct

with a twelve-year-old girl without identifying the girl. During deliberations, the jury asked the trial court several questions, including the following: “On what date was statement made to Dr. Sweeney per defendant’s exhibit #1 and is 12 yr. old girl he refers to [the victim]?” After consulting with counsel for both sides, the trial court responded: “Ladies and gentlemen, in response to your note the date the statement was made was October 24, 1996. I am unable to respond to your second question.” Subsequently, the jury indicated that it had a verdict, but before the foreperson read the verdict, the trial court allowed Moore’s counsel to place an objection on the record:

MR. GILBERT: . . . I would place an objection on the record to the answers to the one question that the jury sent out as to the medical record, report what girl was being referred to. I asked that they specifically state that it was [the victim] that the report was done for, and Ms. Mullett objected to that and the Court put in you couldn’t tell them basically who that person was.

THE COURT: The note that came from the jury said on what date was statement made to Dr. Sweeney per Defendant’s Exhibit No. 1 and is twelve year old girl he refers to [the victim]. The lawyers were in agreement that the date was October 24, 1996. I responded on that regard. It was Mr. Gilbert’s contention that the reference to the 12 year old girl was, in fact, [the victim]. It was the Prosecutor’s contention that since [the victim] was not 12 years old, it was another girl that reference was made to. Inasmuch as there was no antecedent identifying who the 12 year old girl was I responded to the jury I could not respond. But your objection is noted.

Moore now argues that the trial court erred by failing to explain to the jury that the report referred to the victim so that the jury would not speculate that another girl had complained that Moore sexually assaulted her. Further, Moore argues that the trial court should have granted a continuance so that his trial counsel could have verified that the girl mentioned in the report was the victim in this case.

B. Standard Of Review

This Court reviews a trial court’s response to a jury inquiry for an abuse of discretion. See *People v Howe*, 392 Mich 670, 677; 221 NW2d 350 (1974).

C. A Fair And Complete Response

A trial court should fairly and completely respond to a jury inquiry without misleading the jury. *McDonald v Stroh Brewery Co*, 191 Mich App 601, 609; 478 NW2d 669 (1991). The trial court should not, however, answer factual questions posed by the jury during deliberations. See *People v Bonner*, 116 Mich App 41, 46; 321 NW2d 835 (1982).

The record indicates that the trial court could not respond to the inquiry about the twelve-year-old girl’s identity without making a factual determination. We also note that there was no evidence in the record indicating that the twelve-year old girl mentioned in Dr. Sweeney’s report was the victim in

this case. Contrary to Moore's contention on appeal, this conclusion was not obvious through deductive reasoning or any other logical examination of the evidence.¹

We will not consider Moore's argument that the trial court abused its discretion by answering only the half of the jury's question dealing with the date of the report while refusing to give any answer regarding the girl's identity because he did not object in the trial court on that ground. Issues not raised before and considered by the trial court are generally not preserved for appellate review. *People v Conner*, 209 Mich App 419, 422; 531 NW2d 734 (1995). Accordingly, we conclude that the trial court's response to the jury's questions about Dr. Sweeney's report was fair and complete.

D. Request For A Continuance

Moore failed to support his argument that the trial court should have granted him a continuance to allow him the opportunity to demonstrate that the twelve-year-old girl referred to in the report was actually the victim. This Court will not search for authority to support a party's position. *Magee v Magee*, 218 Mich App 158, 161; 553 NW2d 363 (1996). Thus, he abandoned this issue and we do not reach its merits.

IV. Ineffective Assistance Of Counsel

A. Overview

After the jury rendered its verdict, Moore moved for a new trial and an evidentiary hearing to create a record regarding alleged ineffective assistance of counsel. The court denied these motions, along with several others Moore brought at the same time. Moore then asked this Court to remand for an evidentiary hearing on his ineffective assistance claim, which this Court denied. Moore again raises several claims of ineffective assistance of counsel. We address each in turn.

B. Standard Of Review

Because there was no evidentiary hearing conducted with regard to this claim, our review is limited to errors that are apparent from the trial court record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

C. Legal Standard For Ineffective Assistance Of Counsel Claims

In order to establish a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). In other words, a defendant must demonstrate affirmatively that counsel's performance was objectively unreasonable and so prejudicial it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). To do so, the defendant must also overcome the presumption that the challenged action was sound trial

strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991), citing *Strickland, supra*.

D. Interview And Physical Examination Notes From Great Lakes Pediatrics

Moore argues that his counsel was ineffective for failing to object when the trial court admitted Nurse McNees' report and the medical record prepared by Dr. Hickok attached to it. We disagree. The record clearly indicates that defense counsel abstained from objecting to the trial court's decision to admit these pieces of evidence as part of his sound trial strategy. This strategy was to bring out all allegations, charged as well as uncharged, the victim made against Moore in order to then discredit the victim by drawing attention to the inconsistencies in her allegations before and during trial. For instance, some of the sexual contacts the victim alleged occurred were physically impossible for Moore, a paraplegic, to commit. Nurse McNees' report and the attached medical record by Dr. Hickok was essential to this strategy because it allowed defense counsel to point out numerous inconsistencies in the victim's accounts of what had occurred. Even though the trial strategy ultimately failed, its failure does not indicate that Moore was deprived of the effective assistance of counsel. *People v Bart (On Remand)*, 220 Mich App 1, 15 n 4; 558 NW2d 449 (1995). Accordingly, Moore has failed to show that defense counsel's performance in pursuing this strategy was objectively unreasonable or so prejudicial that it denied him a fair trial.

E. "Live" Physician Testimony

Moore asserts that defense counsel was ineffective for failing to have a physician testify "live" at trial instead of merely presenting a physician's report. We disagree. "The decision whether to call [certain] witnesses is a matter of trial strategy." *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). "In order to overcome the presumption of sound trial strategy" and thus prevail on the issue of ineffective assistance of counsel, "the defendant must show that his counsel's failure to call [the] witnesses deprived him of a substantial defense that would have affected the outcome of the proceeding." *Id.* Moore cannot demonstrate that the failure to call a physician "live" at trial deprived him of a substantial defense that affected the outcome of the trial because his trial attorney introduced a physician's report establishing that Moore was incapable of engaging in some of the acts that the victim alleged occurred. This report effectively challenged the victim's credibility and any further testimony from another physician on this matter would have been cumulative at best. A physician testifying in person at trial could not have established anything more on this issue. Thus, Moore has not demonstrated that he was denied a substantial defense by his counsel's decision to admit the medical report instead of calling a physician "live" to the stand.

F. The Sweeney Report

Moore argues that his counsel was ineffective for producing Dr. Sweeney's report because it confused the jury, as the jury's note asking for clarification revealed. Specifically, Moore claims that Dr. Sweeney's report misled the jury into believing that Moore may have been accused of sexually assaulting another young girl. Relying on the superior perspective hindsight affords, we agree that this

report may have confused the jury to a limited extent and that defense counsel may have used poor judgment when he presented the report without clarifying the identity of the twelve-year-old girl.

Nevertheless, we do not conclude that defense counsel's performance was ineffective. As we previously noted:

Effective assistance of counsel is presumed. The defendant bears a heavy burden of proving otherwise Defense counsel's performance must be measured against an objective standard of reasonableness. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight.* [*People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999) (citations omitted).]

We are not convinced that Dr. Sweeney's report was so certain to confuse the jury that an objectively reasonable attorney would have avoided introducing it into evidence. Furthermore, as noted above, the report played an important role in diminishing the victim's credibility. Thus, a reasonable attorney would have to weigh the value of introducing the report into evidence against the potential for confusion. In short, the ultimate decision to introduce the report came down to a matter of strategy, which we will not second-guess. *Rockey, supra*. Judging defense counsel's performance against an objective standard of reasonableness, we hold that Moore was not deprived of the effective assistance of counsel.

V. Prosecutorial Misconduct

A. Preservation And Standard Of Review

Moore claims that the prosecutor committed misconduct while examining the victim's mother and later, during closing arguments, while arguing the evidence. Moore, through his trial counsel, objected when the prosecutor elicited the challenged testimony during trial, thus preserving that issue for our review. *People v Slocum*, 213 Mich App 239, 241; 539 NW2d 572 (1995). "[T]his Court examines the pertinent portion of the record and evaluates the prosecutor's remarks in context in order to determine whether the defendant was denied a fair and impartial trial." *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994).

Moore, however, forfeited review of the alleged instances of misconduct during closing arguments by failing to object to the disputed comments. *Slocum, supra* at 241. Accordingly, we would be obligated to address this challenge only if it constituted a plain error affecting Moore's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1990). We do not see such an error in the prosecutor's closing remarks.

B. Testimony By The Victim's Mother

At trial the prosecutor asked the victim's mother if she knew why Moore was "in a wheelchair?" The victim's mother answered affirmatively, prompting the prosecutor to say, "Okay.

Why?” At that point the victim’s mother replied that “[s]upposedly he was messing around with somebody’s wife.” Defense counsel objected and the court immediately instructed the jury to disregard that testimony. On appeal, Moore contends this testimony inflamed the jury so that it would believe that he is “so sex-crazed that he messes around with other men’s wives and, therefore, it is possible that he also molested [the victim].” He argues that this testimony “was not true, offensive and substantially prejudicial,” the court should have told the jury that the testimony was false, and this prejudicial testimony requires reversing his conviction.

While we agree that the court properly excluded this testimony and instructed the jury that it “may disregard” it,² we see no foundation in the record for the court to instruct the jury, sua sponte, that this testimony was false. More importantly, the transcript does not indicate that the prosecutor intentionally elicited this testimony. See *People v Pearson*, 123 Mich App 462, 464; 332 NW2d 574 (1983) (“The prosecution may not attempt to inject unfounded prejudicial innuendo into the proceedings.”). This was a relevant and proper line of inquiry in light of Moore’s reliance on his physical condition as a part of his defense. See MRE 402. Moore has not pointed to any evidence that the prosecutor knew the witness was inclined to give this particular answer instead of a more neutral answer indicating a physical or biological reason for Moore’s paralysis, like an accident or illness. Regardless of the prosecutor’s intentions, defense counsel’s immediate objection and the court’s swift instruction minimized any prejudice that flowed from this brief and clearly speculative comment. See *People v McQueen*, 85 Mich App 348, 350; 271 NW2d 231 (1978), quoting *People v Fleish*, 321 Mich 443, 462-463; 32 NW2d 700 (1948). Thus, there was no error requiring reversal.

VI. Jury Instructions

A. Preservation And Standard Of Review

Moore argues that the trial court committed error requiring reversal when it referred to Nurse McNees and Dr. Hickok as expert witnesses while instructing the jury. He also contends that the trial court erred when it instructed the jury that it could consider his flight from the state as relevant to his “consciousness of guilt” or a “guilty state of mind.”

This issue is not preserved for our review because Moore failed to object to the jury instructions. *People v Kelly*, 231 Mich App 627, 646; 588 NW2d 480 (1998). Accordingly, our review is restricted to examining the record to determine Moore has demonstrated the existence of a plain error that affected his substantial rights, i.e., an error that affected the outcome of the lower court proceedings. As the Michigan Supreme Court stated recently:

Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error “‘seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings’ independent of the defendant’s innocence.” [*Carines, supra*, at 763-764, quoting *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993).]

B. “Expert” Medical Witnesses

As Moore notes, the challenged instruction elevated all medical witnesses, including Moore’s medical witness, to expert status even though the trial court did not qualify any of them as experts. This was plain error. However, the error did not favor one adversary over the other and, if anything, it bolstered Moore’s medical evidence. Therefore, the error does not require reversal because it did not implicate Moore’s substantial rights by prejudicially affecting the outcome of the trial. *Carines, supra* at 763-764.

C. Flight

In general, evidence of a defendant’s flight following a crime is admissible because it is probative of consciousness of guilt although, by itself, such evidence is insufficient to sustain a conviction. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). On several occasions, this Court has indicated that a flight instruction pursuant to CJI2d 4.4, which the court gave in this case, is proper. See *People v Cutchall*, 200 Mich App 396, 400-401; 504 NW2d 666 (1992); *People v Taylor*, 195 Mich App 57, 63-64; 489 NW2d 99 (1992). This particular instruction informs the jury that flight may occur for innocent reasons and specifically states that flight does not prove guilt. Thus, the instruction itself contradicts Moore’s argument that the court permitted the jury to consider his flight from the state as “substantive proof of guilt.” We see no error here.

VII. Sentencing

A. Standard Of Review

Moore argues that he was sentenced on the basis of inaccurate information because, he contends, the presentence investigator’s report (PSIR) suggests that he molested the victim’s twin sister. He asks us to remand for resentencing in light of this alleged error.

“Where the accuracy of [sentencing] information is in dispute, the trial court must exercise its discretion to consider and weigh the presentence report by responding to defendant’s claims of false information.” *People v Baldwin*, 130 Mich App 653, 655; 344 NW2d 37 (1983). As a result, we review the trial court’s findings with regard to the accuracy of the information for clear error. See MCR 2.613(C); *People v Williams*, 223 Mich App 409, 413-414; 566 NW2d 649 (1997).

B. Multiple Victims

Apparently, both the victim and her twin sister complained to the police that Moore sexually assaulted them. At trial, the victim testified that both she and her twin sister had improper sexual contacts with Moore while her twin sister testified that she was afraid of Moore and would not sit in the front seat of his car because he might try to do “something to her.” The twin sister did not, however, testify that Moore actually sexually assaulted her. Nevertheless, the trial court found that Moore assaulted both girls. This finding, and the reference to multiple victims in the PSIR, was not clearly erroneous given the victim’s testimony and the police report. Consequently, resentencing is not necessary.

VIII. Credit For Jail Time

A. Preservation And Standard Of Review

Moore claims that the trial court failed to award him a credit against his sentence for the two weeks he spent in jail in a foreign jurisdiction awaiting extradition to Michigan to stand trial for the charges in this case. Moore raised this issue at sentencing and the trial court evidently indicated that it would be willing to give him credit for this time already served, but failed to do so. This issue is therefore preserved for appeal. *Phillips, supra* at 492.

Whether a defendant received the proper amount of credit for time she or he spent in jail is a question of law. See *People v Givans*, 227 Mich App 113, 124; 575 NW2d 84 (1997). We review issues of law de novo. *People v Parker*, 230 Mich App 337, 342; 584 NW2d 339 (1998).

B. Moore's Incarceration In Virginia

MCL 769.11b; MSA 28.1083(2) mandates that a trial court grant a defendant credit against a sentence when he or she serves time in jail "prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted" This credit applies even when a defendant spends time in jail in another state awaiting extradition. *People v Gibson*, 101 Mich App 205, 206-207; 300 NW2d 500 (1980). Our review of the record indicates that Moore may not have been given credit for time served while he was being held on a fugitive warrant in Virginia and that he was entitled to that credit. *Id.*

We affirm Moore's conviction and sentence, but remand for the court to determine the proper amount of time to credit against his prison sentence due to time he spent in jail awaiting extradition. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Joel P. Hoekstra

/s/ Donald S. Owens

¹ The Sweeney report states, in pertinent part:

He [Moore] states that he *presently* takes care of several kids of a friend during the day and has been doing this most days. He states that *over the past several months* there has been a problem where he has noted on several occasions the *12-year old girl having sex with a boyfriend*. He states that *he informed the child's father* of this problem on several occasions. He went away on vacation, at which time he was apparently hospitalized with decubiti ulcers. Upon his return from vacation he apparently was *accused by the child's father* and the child of having intercourse with the child. [Emphasis supplied.]

At the time Moore made the statement to Dr. Sweeney, the victim was seventeen years old. At the time of the first-degree criminal sexual conduct she was ten; she reported the conduct when she was eleven years old. Dr. Sweeney's report refers to a twelve-year-old girl. In addition, the report refers to children whom Moore was currently caring for during the day. Moore was not caring for the victim or her siblings at the time he spoke with Dr. Sweeney in 1996. The report also clearly indicates that the twelve-year-old for whom he was caring was having sexual intercourse with a boyfriend. There was no evidence that the victim here had a boyfriend or had sexual intercourse with a boyfriend. Finally, the report refers the twelve-year-old's father. No evidence was presented at trial that the victim's father was ever aware of any allegations of sexual abuse or that he ever accused Moore of improper conduct.

² While the trial court's use of the word "may" was somewhat confusing, as opposed to instructing the jury that it "must" or "should" disregard the testimony, we do not believe that the trial court's choice of words affects the outcome of this case.