STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 15, 2000
v	No. 202801 Calhoun Circuit Court
BRIAN LAMONT ARMSTRONG, Defendant-Appellant.	LC No. 96-003358-FC

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

PER CURIAM.

Defendant appeals of right from his jury trial conviction of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(f); MSA 28.788(2)(1)(f). He was sentenced as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to twenty-five to forty years' imprisonment. We affirm.

Defendant contends that the prosecutor engaged in misconduct by presenting argument to the venire during voir dire. We disagree. Defendant failed to object to any of the seven instances of claimed misconduct. As a result, he must show plain error affecting his substantial rights in the prosecutor's argument. *People v Carines*, 460 Mich 750, 764-767, 774; 597 NW2d 130 (1999). Each of the instances that defendant characterizes as argument consist of the prosecutor asking questions about elements of the offense and how the venire would evaluate the testimony of the victim given that she went to the apartment willingly and, although underage, drank alcohol with defendant.

The scope of voir dire is within the discretion of the trial court. MCR 6.412(C)(1). A trial court abuses its discretion when it limits voir dire such that the parties are unable to develop an adequate showing of facts that could be employed in exercising challenges for cause and peremptory challenges. *People v Tyburski*, 445 Mich 606, 619; 518 NW2d 441 (1994); *Fedorinchik v Stewart*, 289 Mich 436, 438-439; 286 NW 673 (1939). This Court has found that inquiries to the venire concerning the weight it would give to the testimony of a six-year-old were proper. *People v Dunham*, 220 Mich App 268, 271; 559 NW2d 360 (1996). The prosecution's similar questions in this case were proper and do not constitute plain error.

Defendant argues that he was denied due process when the prosecution failed to conduct DNA testing on the fluids found on the victim when she was examined and the blood and saliva samples obtained from defendant. We disagree. Defendant's claim, which is in essence a claim that the prosecution suppressed exculpatory evidence, is a mixed question of law and fact. We review fact issues for clear error, while issues of law are reviewed de novo. *People v Tracey*, 221 Mich App 321, 323-324; 561 NW2d 133 (1997). In this case, the prosecution obtained a blood and saliva sample from defendant pursuant to a search warrant. However, it concluded after it obtained the fluids that there would be insufficient time to obtain DNA testing.

"Suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). To establish a *Brady* violation, a defendant must prove that: (1) the state possessed evidence favorable to the accused; (2) he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) the prosecution suppressed the favorable evidence; and (4) had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267 (1998). Defendant's claim fails on all counts.

There is no evidence that the prosecution possessed evidence favorable to the accused; it simply did not conduct tests. The prosecution did nothing to suppress this evidence. Due process is not violated where the police fail to test evidence in their possession. *Arizona v Youngblood*, 488 US 51, 58-59; 109 S Ct 333; 102 L Ed 2d 281 (1988). Neither the prosecution nor the defense has an affirmative duty to search for evidence to aid the other's case. *People v Burwick*, 450 Mich 281, 289 n 10; 537 NW2d 813 (1995). There is nothing to indicate that defendant could not have obtained the tests himself. Furthermore, because defendant admitted to having sex with the victim, we fail to see how confidence in the outcome of the proceedings has been undermined. Absent a showing of actual prejudice or that the evidence was in fact exculpatory, defendant's claim is without merit. *People v Adams*, 232 Mich App 128, 136-137; 591 NW2d 44 (1998).

Similarly, we reject defendant's claim that the court abused its discretion in denying his motion for continuance in order to obtain DNA testing. When reviewing a trial court's decision to deny a defendant's motion for a continuance, this Court considers whether: (1) the defendant is asserting a constitutional right, (2) the defendant has a legitimate reason for asserting the right, (3) the defendant was negligent in asserting his right, (4) the defendant is merely attempting to delay trial, and (5) the defendant demonstrated prejudice resulting from the trial court's decision. *People v Peña*, 224 Mich App 650, 661; 569 NW2d 871 (1997), mod 457 Mich 885 (1998). Defendant did not request the adjournment until the day of trial, after the jury had been selected. His basis for the request, the absence of DNA testing, was known to him for some time before the day of trial. Further, as discussed above, defendant did not suffer prejudice from the denial of the motion for adjournment in order to obtain DNA testing because he admitted the element of sexual penetration. We see no abuse of discretion.

Defendant next contends that his prosecution for two counts of CSC I violates the Double Jeopardy Clause of US Const, Ams V and XIV and Const 1963, art 1, § 15 when the acts occurred in one continuous criminal transaction. We disagree. The Double Jeopardy Clauses of US Const, Ams V and XIV and Const 1963, art 1, § 15 protect two rights: the right against successive prosecutions for the same offense, and the right against multiple punishments for the same offense. *Missouri v Hunter*, 459 US 359, 366; 103 S Ct 673; 74 L Ed 2d 535 (1983); *People v Denio*, 454 Mich 691, 706; 564 NW2d 13 (1997).[1] The purpose of the protection against multiple punishments is to ensure that punishment for a crime does not exceed that authorized by the Legislature. *People v McClain*, 218 Mich App 613, 615; 554 NW2d 608 (1996). In the present case, each count required proof of a fact that the other did not; the prosecutor had to prove that defendant penetrated with his mouth in one count, and with his penis in the other. No federal double jeopardy violation exists. *Denio, supra* at 707. Similarly, defendant's claim under Const 1963, art 1, § 15 fails. This Court has previously held that the Legislature intended to punish separately each criminal sexual penetration; as a result, multiple penetrations may be prosecuted, even when they occurred in the course of a single assaultive episode. *People v Wilson*, 196 Mich App 604, 608; 493 NW2d 471 (1992), citing *People v Dowdy*, 148 Mich App 517, 521; 384 NW2d 820 (1986). Defendant's double jeopardy claim is meritless.

Defendant contends that his concurrent sentences of twenty-five to forty years' imprisonment are disproportionate. We disagree. This Court reviews the sentence to determine if the trial court abused its discretion by imposing a sentence that is not proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990); *People v Alexander*, 234 Mich App 665, 679; 599 NW2d 749 (1999). In this case, defendant's prior criminal record, the short time between his release from prison and the commission of the offenses, and the deliberate nature of the offenses justified the court's sentencing decision. We see no abuse of discretion. *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997). In addition, we see no violation of the prohibition against cruel and unusual punishment. US Const, Am VIII; Const 1963, art 1, §16. A proportionate sentence is not cruel and unusual. *People v Terry*, 224 Mich App 447, 456; 569 NW2d 641 (1997).

Affirmed.

/s/ William C. Whitbeck
/s/ Joel P. Hoekstra
/s/ Donald S. Owens

[1] Defendant argues that this is a "successive prosecutions" case for double jeopardy purposes. However, defendant was prosecuted for both offenses in one trial. A successive prosecutions claim arises only in the context of multiple trials. See *Denio, supra* at 707 n 18. Defendant's claim implicates the protection against multiple punishments.