

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALLEN J. NEWMAN,

Defendant-Appellant.

UNPUBLISHED

March 21, 2000

No. 206649

Oakland Circuit Court

LC No. 96-146686-FH

Before: Neff, P.J., and Sawyer and Saad, JJ.

PER CURIAM.

Defendant appeals as of right from a jury conviction of third-degree criminal sexual conduct (CSC), MCL 750.520d(1)(b); MSA 28.788(4)(1)(b), for which he was sentenced as a second habitual offender, MCL 769.10; MSA 28.1082, to a term of 2 to 22- 1/2 years in prison. We affirm.

Defendant contends that the evidence was insufficient to sustain the verdict and that the verdict was against the great weight of the evidence. Defendant failed to preserve the latter issue because he did not move for a new trial on that basis, *People v Patterson*, 428 Mich 502, 514-515; 410 NW2d 733 (1987); *People v Johnson*, 168 Mich App 581, 585; 425 NW2d 187 (1988), and, therefore, we will confine our analysis to the legal sufficiency of the evidence.

In reviewing the sufficiency of the evidence in a criminal case, this Court must review the record de novo and, viewing the evidence in a light most favorable to the prosecution, determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997); *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995). Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of the crime. *People v Gould*, 225 Mich App 79, 86; 570 NW2d 140 (1997). All conflicts in the evidence are to be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

A person is guilty of third-degree CSC if he engages in sexual penetration with another person and force or coercion is used to accomplish the sexual penetration. MCL 750.520d(1)(b); MSA 28.788(4)(1)(b). Force or coercion includes, but is not limited to, circumstances in which the actor

overcomes the victim through the actual application of physical force or physical violence. MCL 750.520b(1)(f)(i); MSA 28.788(2)(1)(f)(i); MCL 750.520d(1)(b); MSA 28.788 (4)(1)(b). Force includes the exertion of strength or power on another person. *People v Premo*, 213 Mich App 406, 409; 540 NW2d 715 (1995). “The existence of force or coercion is to be determined in light of all the circumstances and is not limited to acts of physical violence.” *People v Malkowski*, 198 Mich App 610, 613; 499 NW2d 450 (1993), overruled in part on other grounds in *People v Edgett*, 220 Mich App 686; 560 NW2d 360 (1996).

The complainant testified that defendant grabbed her by the arms and placed her on the bed, pinned her leg and her hands, and penetrated her with his penis. By lifting the complainant and moving her body, defendant exerted strength or power over her, as he did when he pinned her leg and hands. The testimony further indicated that those acts were used to accomplish the penetration. The victim was not required to resist and her testimony need not be corroborated. MCL 750.520h; MSA 28.788(8); MCL 750.520i; MSA 28.788(9). The foregoing evidence, viewed most favorably to the prosecution, was sufficient to prove each element of the crime charged beyond a reasonable doubt.

Defendant also contends that the trial judge’s conduct denied him a fair and impartial trial. We review the record as a whole to determine whether the trial judge’s conduct or comments were of such a nature as to unduly influence the jury and thereby deprive defendant of his right to a fair and impartial trial. *People v Collier*, 168 Mich App 687, 697-698; 425 NW2d 118 (1988).

A criminal defendant is entitled to both a neutral and detached magistrate and to an attorney who is treated with the consideration due an officer of the court. *People v McIntire*, 232 Mich App 71, 104; 591 NW2d 231 (1998), rev’d on other grounds 461 Mich 147 (1999); *People v Ross*, 181 Mich App 89, 91; 449 NW2d 107 (1989). “A jury trial demands the fact and appearance of judicial impartiality, neither of which should ever be compromised by comments that unfairly belittle defense counsel.” *People v Wigfall*, 160 Mich App 765, 773; 408 NW2d 551 (1987). Belittling observations aimed at defense counsel are injurious to his client. *Ross, supra* at 91. Trial judges who berate, scold, and demean an attorney so as to hold him up to contempt in the eyes of the jury destroy the balance of impartiality necessary for a fair hearing. *Id.*; *People v Anderson*, 166 Mich App 455, 462; 421 NW2d 200 (1988). While unfair criticism of defense counsel in front of the jury is always improper, judges are only human and expressions of impatience, dissatisfaction, annoyance, and anger that are fully within the bounds of what imperfect men and women sometimes display are not necessarily grounds for reversal, which is mandated only if the court’s conduct unduly influenced the jury so as to deny the defendant a fair and impartial trial. *Id.* at 462; *McIntire, supra* at 105; *Wigfall, supra* at 774.

Several of the judge’s remarks were made before jury selection began or outside the presence of the jury and thus could not have affected defendant’s right to a fair and impartial trial. See *People v Pauli*, 138 Mich App 530, 544; 361 NW2d 359 (1984). The few comments made by the judge in the jury’s presence were provoked by defense counsel’s quarrelsome behavior in refusing to accept the court’s repeated rulings on the same issue and his persistent repetition of an argument previously rejected. The judge also modified CJI2d 3.5(6) to impress upon the jury that it should not be influenced by any irritation she expressed toward an attorney. Accordingly, we find that the challenged remarks were not so egregious as to deny defendant a fair and impartial trial. See *McIntire, supra* at 105;

Anderson, supra at 462. Although one juror submitted an affidavit indicating that her verdict was influenced by the judge's negative attitude, the affidavit was too generalized and vague to warrant relief. *People v Vettese*, 195 Mich App 235, 244; 489 NW2d 514 (1992).

Defendant also contends that the trial court erred in refusing to excuse certain jurors for cause. This issue has not been preserved because defendant expressed satisfaction with the jury apart from its composition and did not exhaust his peremptory challenges. *People v Daniels*, 192 Mich App 658, 667; 482 NW2d 176 (1992); see also *People v Lee*, 212 Mich App 228, 248-249; 537 NW2d 233 (1995).

Defendant also contends that he was denied the effective assistance of counsel. The general rule is that effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). To establish that a defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, the defendant must show that counsel's representation fell below an objective standard of reasonableness and that the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995). The defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy and show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Defendant argues that counsel was ineffective because he failed to call a witness who could have testified that the bruise on the victim's arm might have been caused by someone other than defendant. This issue has not been preserved for appeal because defendant did not include it in his statement of questions presented. *City of Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995). In any event, defendant's claim is without merit. Counsel's failure to call a particular witness is a matter of trial strategy and does not constitute ineffective assistance unless the failure deprives the defendant of a substantial defense, i.e., one the might have made a difference in the outcome of the trial. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999); *People v Bass (On Rehearing)*, 223 Mich App 241, 252-253; 565 NW2d 897 (1997), vacated in part on other grounds, 457 Mich 866 (1998). Apart from the fact that the witness had no knowledge regarding when or how the victim acquired the bruise on her arm, the evidence of the bruise was not determinative of the issue of force, there being other evidence sufficient to establish that element as noted above. Therefore, the witness' testimony could not have affected the outcome of the trial.

Defendant also argues that counsel was ineffective for failing to exercise all of his peremptory challenges to strike jurors who had initially expressed an inability to be fair because they considered defendant's conduct morally wrong. However, the failure to challenge one or more jurors is a matter of trial strategy and does not constitute ineffective assistance of counsel. *People v Robinson*, 154 Mich App 92, 95; 397 NW2d 229 (1986).

Defendant also contends that the trial court erred in denying his motion in limine to introduce evidence regarding the complainant's past sexual conduct. The trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion, which "is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made." *Gould, supra* at 88.

Evidence of a person's character or a trait of character is not admissible to prove action in conformity therewith on a particular occasion except that in a prosecution for CSC, evidence of the victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease is admissible. MRE 404(a)(3); MCL 750.520j(1); MSA 28.788(10)(1). In certain limited situations, evidence that does not come within the specific exceptions in the rape-shield statute¹ "may not only be relevant, but its admission may be required to preserve a defendant's constitutional right to confrontation." *People v Hackett*, 421 Mich 338, 344, 348; 365 NW2d 120 (1984). For example, evidence of a victim's past sexual conduct may be admissible to show bias, to show an ulterior motive for making a false charge, or to show that the complainant has made false accusations of rape in the past. *Id.* In addition, if "the prosecution substantiates its case by demonstrating a physical condition of the complainant from which the jury might infer the occurrence of a sexual act, the defendant must be permitted to meet that evidence with proof of the complainant's prior sexual activity tending to show that another person might have been responsible for her condition." *People v Mikula*, 84 Mich App 108, 114; 269 NW2d 195 (1978). The defendant must make an offer of proof showing the existence of the proposed evidence and its relevance to the purpose for which it is sought to be admitted. *Hackett, supra* at 349-350; *People v Arenda*, 416 Mich 1, 14; 330 NW2d 814 (1982). If the defendant makes such a showing, the court must conduct an evidentiary hearing to determine the admissibility of such evidence. *Hackett, supra* at 350. Absent such a showing, the motion must be denied. *Id.*

Defendant sought to offer evidence that the complainant had sexual relations with her boyfriend to prove that (1) he could have caused the bruise to her arm, and (2) the complainant falsely accused defendant of raping her. However, defendant failed to offer any evidence to show that the boyfriend did anything to cause a bruise to the complainant's arm. Moreover, as noted above, the existence of the bruise was not determinative of the issue of force. Defendant also failed to offer any evidence of any precipitating events that would have caused the complainant to fabricate a claim of rape. Because defendant's arguments were purely theoretical and he had no proof to support either supposition, the trial court properly excluded the evidence. See *Arenda, supra*; *People v Morse*, 231 Mich App 424, 431; 586 NW2d 555 (1998).

Defendant also asserts that the trial court erred when it precluded his attorney from cross-examining the complainant about inconsistencies in her testimony at trial and that provided at prior hearings. The scope of cross-examination of a witness is a matter within the trial court's discretion, *People v Jensen*, 162 Mich App 171, 180; 412 NW2d 681 (1987), and the court's limitation of cross-examination is thus reviewed for an abuse of discretion. *People v Crawford*, 232 Mich App 608, 620; 591 NW2d 669 (1998). The court did not prevent defense counsel from cross-examining the witness. Rather, it prevented counsel from reading to the jury from transcripts of the prior hearings.

Moreover, any error was undoubtedly harmless because defense counsel was able to elicit admissions from the complainant about the discrepancies in her testimony and used them to argue that she was not credible.

Affirmed.

/s/ Janet T. Neff

/s/ David H. Sawyer

/s/ Henry William Saad

¹ MCL 750.520j(1); MSA 28.788(10)(1).