STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 14, 2000
v	No. 205859 Macomb Circuit Court
JAMES ROBERT RIDDLE, Defendant-Appellant.	LC No. 97-000280-FC

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

PER CURIAM.

Defendant appeals as of right from his jury convictions of two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(b); MSA 28.788(4)(1)(b), for which he was sentenced to two concurrent prison terms of six to fifteen years each.[1] We affirm.

I. FACTS AND PROCEEDINGS

This case arises from defendant's alleged sexual assault against complainant, his on-and-off girlfriend. According to the prosecution, defendant abducted complainant in the early morning hours of December 1, 1996, drove her to his mother's home, and forced her to commit sexual acts, including "bondage" acts, in the garage. The complainant signed a police complaint and initially agreed to press charges. At defendant's preliminary hearing, she testified that defendant forced her to perform fellatio and vaginal intercourse. However, at trial the complainant testified that she had consented to the sexual acts and that she and defendant had engaged in consensual bondage before. The complainant stated that she made the police report and testified against defendant at the preliminary hearing because her mother threatened to have complainant's and defendant's daughter taken into "protective custody." The complainant also stated that she intended to marry defendant. The trial court declared the complainant to be a hostile witness and allowed the use of her written statement to the police as impeachment evidence. The jury convicted defendant of two counts of third-degree criminal sexual conduct.

II. ANALYSIS

A

Defendant argues that the trial court erred by admitting the complainant's written police statement into evidence. Defendant's argument concerning the written statement is two-fold: (1) without a limiting instruction, the statement exceeded the scope of impeachment; and (2) the prosecutor improperly used the statement as substantive evidence in closing remarks. These arguments are without merit.

Because the complainant's statement to the police would constitute inadmissible hearsay if admitted as substantive evidence to prove the truth of the matter,[2] the trial court admitted this statement only as impeachment.[3] "When a witness claims not to remember making a prior inconsistent statement, he may be impeached by extrinsic evidence of that statement." *People v Jenkins*, 450 Mich 249, 256; 537 NW2d 828 (1995). However, "[t]he purpose of extrinsic impeachment evidence is to prove that a witness made a prior inconsistent statement—not to prove the contents of the statement." *Id.*

Defendant argues that the written statement here exceeded the scope of permissible impeachment. In addition to contradicting the complainant's testimony that she consented to the sexual acts, the statement further averred that defendant had threatened the complainant with physical violence and hit her. Because defendant failed to request a limiting instruction at trial, we review only for manifest injustice. *People v Hendricks*, 446 Mich 435, 440-441; 521 NW2d 546 (1994); *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997). Manifest injustice occurs where the erroneous or omitted instruction pertains to a basic and controlling issue in the case. *Id.* There was no manifest injustice here because under the circumstances these references were only minimally prejudicial. Without the letter, there was already evidence that defendant had been violent toward the complainant during the incident, including the complainant's testimony that defendant threatened to strike her in the face and tape her mouth shut.

Defendant further contends that the prosecutor improperly used the impeachment evidence as substantive evidence in closing argument. We have reviewed the closing argument and find that the prosecutor properly referred to the statement only for purposes of impeachment.

B

Defendant maintains that three unresponsive, volunteered remarks from prosecution witnesses injected unfairly prejudicial information into the proceedings and denied him a fair trial. We disagree. Defendant made no objection to any of these remarks, thus appellate review is foreclosed absent manifest injustice. *People v Cain*, 238 Mich App 95, 115; 605 NW2d 28 (1999).

Defendant's argument is based on three occurrences: (1) the complainant's mother testified that she was afraid for the complainant's safety when she heard that the latter was with defendant because she knew from experience "how [defendant] was"; (2) in response to hearing that defendant had allegedly raped the complainant, the mother testified she said, "what, again?"; (3) the complainant herself mentioned that the prosecutor had asked her about defendant's "other case." Defendant concedes that the prosecuting attorney carefully tried to avoid the subject matter which was likely to produce the improper remarks, and does not claim prosecutorial misconduct.

If the prosecutor had deliberately elicited the witnesses' testimony on these matters, the testimony arguably might have been improper evidence of prior bad acts under MRE 404(b); *People v Crawford*, 458 Mich 376, 384; 582 NW2d 785 (1998).[4] However, "an unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial." *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). Defendant cites no cases in which a conviction was reversed because of prejudicial volunteered evidence which the prosecutor did not encourage and to which the defense did not object. We decline to establish such a precedent. In any event, to the extent that the volunteered remarks were prejudicial, the proper remedy for the potential prejudice from these remarks would have been a curative instruction. See *People v Stegall*, 102 Mich App 147, 152; 301 NW2d 473 (1980).

Furthermore, two of the three challenged statements related to the complainant's mother's opinion of defendant. Defendant's own counsel questioned the mother about her dislike of defendant, and about why she did not believe that complainant voluntarily agreed to go to defendant's home. Defense counsel also elicited testimony from the complainant that she and her mother had a long-standing conflict over the complainant's relationship with defendant, and that her mother threatened to have the complainant's child removed unless the complainant testified against defendant at the preliminary hearing. Accordingly, defendant cannot argue that the mother's volunteered remarks prejudiced him when they comported with the defense theory that the complainant accused defendant of rape only because her mother persuaded her to do so.

C

Finally, defendant argues that he was denied a fair trial because the prosecuting attorney was permitted to call a witness to impeach the complainant's testimony on a collateral matter. We disagree.

The prosecuting attorney asked the complainant if defendant had ever threatened to kill her. The complainant responded in the negative. The prosecuting attorney then produced a police report prepared shortly after the incident in question. According to the report, the complainant informed the police that defendant had telephoned the complainant's mother and threatened that he would kill the complainant if she continued pressing charges. After the prosecutor produced the report, the complainant asked "When I was [sic] supposed to have said that" and stated "I still don't remember saying that." The prosecuting attorney then recalled the police detective to whom the complainant allegedly made the statement, and the detective testified that the complainant had indeed reported receiving such a death threat.

It is well established that "the device of eliciting a denial on cross-examination may not be used to inject a new issue into the case." *People v Losey*, 413 Mich 346, 352; 320 NW2d 49 (1982).

Furthermore, it is well established that:

> [o]n collateral matters, the testimony of a witness is binding except as it may be shaken by his own cross-examination, and even such cross-examination may be limited in the discretion of the trial judge to keep the trial within the bounds of relevancy and

> pertinency. *Under no circumstances may testimony of others be produced to impeach by putting in issue the accuracy or truthfulness of the witness on unrelated matters*. [*People v Ellerhorst*, 12 Mich App 661, 670-671; 163 NW2d 465 (1968) (emphasis added).]

Here, the alleged threat related to a collateral matter because it was factual issue not relevant to the determination of defendant's guilt or innocence. Therefore, it was error for the prosecuting attorney to call a witness to rebut the complainant's testimony in this regard. However, we conclude that this was harmless error.

Because this error is unpreserved, a "reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). Defendant's argument does not satisfy this standard of review. Despite the complainant's trial testimony, there was substantial evidence that the complainant's recantation of her earlier rape accusation was not credible. In addition to the complainant's own prior inconsistent statements, her mother and friend gave testimony that supported the prosecution's theory. The friend, Larson, testified that defendant made threatening comments to Larson before driving off with the complainant, that defendant struck her on the face when Larson arrived at defendant's mother's home, and that the complainant was visibly upset and told her mother that defendant had raped her. The mother testified that when she arrived at the garage after the incident took place, defendant gestured as if to strike her, and the complainant stated that defendant had raped her. Given this evidence, we cannot say that defendant was innocent or that the detective's testimony "seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.*, 774.

Furthermore, because the prosecuting attorney effectively impeached the complainant's testimony about the death threat by referring to the police report, the detective's actual testimony confirming that the complainant had related such a threat to him was merely cumulative. Moreover, the complainant did not testify that *she* received a death threat from defendant, but rather that *her mother* told her about an alleged threat. Given the defense theory that the complainant's mother hated defendant and induced the complainant to make a false complaint against him, evidence that the mother relayed an alleged death threat to the complainant was not necessarily prejudicial against defendant. Under these circumstances, any error was harmless; indeed, it is harmless even under the standard for *preserved* nonconstitutional error (defendant must establish that more probably than not a miscarriage of justice has resulted). *Id.*

Affirmed.

/s/ Janet T. Neff
/s/ David H. Sawyer
/s/ Henry William Saad

[1] Defendant was also convicted of malicious destruction of property and simple assault, but these convictions and sentences are not at issue in this appeal.

[2] MRE 801(c).

[3] MRE 613(b) allows admission of extrinsic evidence of a witness's prior inconsistent statement provided that the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to examine the witness on the prior statement. MRE 613(b). Defendant does not contend that this rule was violated.

[4] Of course, we cannot resolve any MRE 404(b) issue because the prosecutor did not elicit such testimony and therefore had no opportunity to argue that the evidence was proper.