

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BILLY DEE SCHWERWIN,

Defendant-Appellant.

UNPUBLISHED

September 15, 2000

No. 214495

Bay Circuit Court

LC No. 98-001174-FC

Before: Talbot, P.J., and Hood and Gage, JJ.

MEMORANDUM.

Defendant was convicted, following a jury trial, of two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a); MSA 28.788(40)(1)(a). He was sentenced as an habitual offender, third offense, MCL 769.11; MSA 28.1083, to a term of eight to thirty years' imprisonment. Defendant appeals as of right, and we affirm.

Defendant first argues that the trial court erred in allowing the victim's doctor to testify regarding the pain involved in anal penetration. We disagree. The decision to allow the admission of evidence rests in the discretion of the trial court, and we will reverse only where there is an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Review of the record reveals that the prosecutor established that Dr. Varin Kule had examined hundreds or thousands of patients over the years and performed rectal examinations. Based on this experience, Dr. Kule opined that anal penetration by a penis would cause an individual to experience some pain. Defendant did not object to the foundation established for the basis of the opinion. Accordingly, we cannot conclude that the trial court abused its discretion in admitting this testimony. *Lukity, supra*. In any event, even if we could conclude that an abuse of discretion occurred, Dr. Kule's testimony was cumulative to the victim's testimony regarding the pain he experienced during and after the penetrations. *People v Rodriquez (On Remand)*, 216 Mich App 329, 332; 549 NW2d 359 (1996).

Defendant next argues that prosecutorial misconduct occurred when the prosecutor attempted to question defendant regarding events that the trial court had ruled were inadmissible. We disagree. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Rice (On Remand)*, 235 Mich App 429, 434; 597 NW2d 843 (1999). We review the

prosecutor's remarks in context to determine whether the defendant was denied a fair and impartial trial. *Id.* Review of the record reveals that the prosecutor did not violate the trial court's ruling regarding impeachment with prior convictions. Rather, the prosecutor attempted to impeach the witness regarding a threat involving another individual. However, before the prosecutor could elicit any testimony, defense counsel objected, and the testimony was excluded. There is no evidence that the prosecutor attempted to deny defendant a fair and impartial trial or tried to circumvent the ruling of the trial court regarding impeachment with prior convictions. Accordingly, defendant's claim is without merit. *Rice, supra.*

Affirmed.

/s/ Michael J. Talbot

/s/ Harold Hood

/s/ Hilda R. Gage