

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CALVIN LYNN MOORE,

Defendant-Appellant.

UNPUBLISHED

January 16, 2001

No. 216064

Wayne Circuit Court

LC No. 98-004318

Before: Markey, P.J., and Whitbeck and J. L. Martlew*, JJ.

PER CURIAM.

Defendant Calvin Moore was convicted following a bench trial of assault with intent to commit criminal sexual conduct involving sexual penetration¹ and sentenced as a second-offense habitual offender² to serve an enhanced prison term of five to fifteen years. Moore appeals as of right and we affirm. We decide this appeal without oral argument pursuant to MCR 7.214(E).

I. Basic Facts And Procedural History

According to her testimony at Moore's preliminary examination, the 20-year-old complainant went to a Super Bowl party with some friends. At the party, she met Moore, who offered to drive her home at about 2:30 a.m. As Moore was driving on the highway, the complainant noticed that he was not traveling toward her home. She asked where he was heading, and he said that he was going to take her to Chicago, take off all her clothes, and leave her by the side of the road. They began to "tussle" and fight.

Then, complainant said, Moore parked the car on the side of the road and repeatedly punched and bit her. She got out of the car and started to walk up the exit ramp of the highway, but Moore ran after her, sprayed mace in her face, dragged her back to the car, and continued to

¹ MCL 750.520g(1); MSA 28.788(7)(1).

² MCL 769.10; MSA 28.1082.

* Circuit judge, sitting on the Court of Appeals by assignment.

punch, kick, and bite her. She could not see because of the mace, but she pulled at the steering wheel to get the car to stop as they drove away from that spot.

Eventually, Moore pulled into a driveway and the complainant got out and ran toward the house. Moore ran after her and they continued fighting in the yard. Moore then dragged her to the car, spraying her again with mace, punching her repeatedly about the head, and pulling at her clothes. Moore pulled off her leather coat and her underwear, pulled down her top, and pulled up her skirt. Once inside the car, Moore climbed on top of her and attempted to penetrate her vagina with his penis. While she was trying to fend him off, she blew the car horn with her foot. The complainant believed that this went on for at least fifteen minutes until a man came out of the house and tried to pull her from the car. Moore drove away and “somehow” the complainant ended up on the ground. The complainant was taken to the hospital. As a result of this assault, she lost four front teeth and she sustained numerous bite marks and bruises to her arms, legs, head, and body.

At trial, Margaret Neil testified that she lived at the house where Moore had pulled his car into the driveway. According to Neil, between 6:00 a.m. and 6:30 a.m., she heard a car horn continually blowing and looked out the window to see two people fighting in the car. She called 911 after hearing the woman scream “please let me go” and “stop.” Neil and her husband ran outside to help and saw the complainant and Moore fighting in the car. The complainant’s hair was tangled and she was nude above the waist. Moore appeared to be dressing or pulling something on his body. Neil’s husband, William Neil, attempted to pull the complainant from the car, but Moore drove off. Neil read the license plate number and gave that information to the police.

A police officer testified at trial that he found the complainant lying in the roadway some distance from the Neils’ house. The complainant was partially nude, her top was pulled down and her skirt was pulled up, exposing her nude groin and buttocks. The officer described the complainant as semi-conscious with blood on her face, missing front teeth, and numerous contusions and lacerations on all her limbs.

The complainant died before trial for reasons unrelated to the assault. However, the trial court admitted her testimony from the preliminary examination into evidence.

Moore, testifying on his own behalf, stated that after he and the complainant left the party, they dropped off another person at home, stopped at a store, ate at a restaurant, stopped at a gas station for gas, and then went to a motel to get a room at the complainant’s suggestion. When he went to register at the motel, he noticed that the \$300 he had in his coat pocket was missing. He started to drive back to the restaurant but instead pulled into a driveway and asked the complainant to help him search the back seat for the money. When they did not find the money, he accused her of stealing it. She became “haughty” and “pulled down her panties down to her knees” to show him that she did not have it. He then asked to search her boots and she reluctantly agreed but only removed one boot. She then said that she was going to walk home, but he locked the car doors. The complainant began screaming and two people came out of the house. Moore testified that he “fear[ed] for his life” and backed the car up and drove away. Moore stated he intended to drive the complainant to the police station, but she jumped out the

window of the moving car. When asked whether he had attempted to rape the complainant, Moore emphasized, “I never touched that young lady at all. All those allegations are false.”

In ruling from the bench, the trial court found there were some credibility questions regarding the complainant’s testimony, but found Moore’s version of events “hard to believe.” Relying primarily on the Neils’ testimony and the medical and photographic exhibits of the complainant’s injuries, the trial court found Moore guilty of assault with intent to commit criminal sexual conduct involving sexual penetration, but acquitted Moore of a separate charge of assault with intent to cause great bodily harm.

II. Sixth Amendment Right Of Confrontation

A. Standard Of Review

Moore argues that his Sixth Amendment right of confrontation was violated when the deceased complainant’s preliminary examination testimony was read at trial, excluding the portion of the cross-examination testimony that the prosecutor had objected was irrelevant. The subject matter of this disputed testimony was the source of the complainant’s money that she testified she had at the time of the assault. Moore also contends that the district court’s limitation on cross-examination was improper because such testimony would have been probative of the complainant’s credibility and motive to fabricate the charges against defendant. We review a trial court’s decision to admit or exclude evidence for an abuse of discretion.³

B. MRE 804(b)(1)

MRE 804(b) provides exceptions to the rule against admitting hearsay if the declarant is unavailable as defined in MRE 804(a). As is relevant in this case, MRE 804(a)(4) defines a person as unavailable if she had died. MRE 804(b)(1) permits the testimony this unavailable declarant gave at another preceding to be introduced at trial if “the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.” This case presents a textbook example of when this hearsay exception applies. The complainant testified at Moore’s preliminary examination, at which time Moore took advantage of the opportunity to crossexamine her. At the time of trial, the complainant was unavailable under MRE 804(a)(4) because she had died. Thus, the trial court properly admitted this testimony.

Although Moore casts this as a constitutional issue, because this exception to the rule against hearsay is so well established, introducing the complainant’s preliminary examination testimony was not a Confrontation Clause violation.⁴ Further, because there was no Confrontation Clause violation, his related ineffective assistance of counsel claim also fails.

³ See *People v Adams*, 233 Mich App 652, 660; 592 NW2d 794 (1999).

⁴ See *People v Meredith*, 459 Mich 62, 71; 586 NW2d 538 (1998); see also US Const, Am VI; Const 1963, art 1, § 20.

As for Moore's argument that the trial court erroneously ruled that the source of the money the complainant had during the assault was irrelevant, we disagree. While disputes over money may explain a motive to fabricate charges, the trial court in this case relied primarily on physical evidence of the crime, to which this money evidence was irrelevant. Moreover, even if the trial court erred, the error was harmless because there was ample evidence of Moore's guilt.⁵

Affirmed.

/s/ Jane E. Markey
/s/ William C. Whitbeck
/s/ Jeffrey L. Martlew

⁵ See *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000).