

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARTIN RAMIREZ,

Defendant-Appellant.

UNPUBLISHED

January 27, 2004

No. 242381

Wayne Circuit Court

LC No. 01-010728

Before: Fitzgerald, P.J., and Neff and White, JJ.

PER CURIAM.

Defendant appeals as of right from jury convictions of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(e), for which he was sentenced to concurrent terms of eighteen to thirty years in prison. We affirm.

Defendant first contends that the trial court erred in admitting the victim's hearsay statement under MRE 803(2). The trial court's ruling regarding the admission of evidence is reviewed for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

A sexual assault is a startling event. *People v Straight*, 430 Mich 418, 425; 424 NW2d 257 (1988). The police officer testified that he arrived on the scene while the victim was still being checked by paramedics. She was crying and frantic. Such evidence showed that the victim, whose statement related to the event, was still under the influence of the event. Therefore, the hearsay statement was properly admitted as an excited utterance. *People v Crump*, 216 Mich App 210, 213; 549 NW2d 36 (1996).

Defendant contends that even though the statement may have appeared to be an excited utterance, it was not admissible because the victim admittedly lied to the police that she saw defendant carrying a revolver during the incident. Defendant failed to preserve this issue because the objection raised below is not the same asserted on appeal. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). Therefore, review is precluded unless the defendant demonstrates plain error that affected the outcome of the lower court proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant asserts that the statement could not have been an excited utterance because the victim lied about seeing a gun, and therefore was able to fabricate. We disagree. At trial, the victim testified that defendant approached her from behind, pulled her hair, and told her he had a

gun, and that he put something to her temple that felt like a gun. She admitted, however, that she never actually saw a gun. She testified that she told the police immediately after the event that defendant had a small steel revolver because of what she saw out of the corner of her eye. The police officer who took the statement testified that the victim was crying and frantic. The discrepancy does not undermine the reliability of the statement so as to make it inadmissible.

In addition, any error in the admission of her hearsay statement about the gun was harmless because the officer's testimony regarding the victim's statement was offered merely to corroborate the victim's own testimony, not as substantive evidence of the sexual assault, and was cumulative of the victim's own testimony. Thus, admission of the hearsay statement did not give the jury any information it did not already have. *People v Hill*, 257 Mich App 126, 140; 667 NW2d 78 (2003); *People v Rodriguez (On Remand)*, 216 Mich App 329, 332; 549 NW2d 359 (1996).

Defendant next contends that he was denied a fair trial due to the admission of improper impeachment evidence regarding convictions for domestic violence. The issue has not been preserved for appeal because defendant did not raise any objection below. MRE 103(a)(1); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Therefore, defendant must show plain error that affected the outcome of the trial to establish a right to relief. *Carines, supra* at 763-764.

Evidence of other crimes that is not admissible under MRE 404(b) or MRE 609 is nonetheless admissible where it is offered to rebut specific testimony offered by the defendant at trial. *People v Douglas Taylor*, 422 Mich 407, 414-415; 373 NW2d 579 (1985). Defendant testified that he would never hurt a woman with whom he had sex. It is unclear from defendant's testimony whether he meant that he would never hurt a woman to accomplish sex or that he would never hurt any woman who had been a sexual partner. Because he may have meant the latter and the evidence was relevant to rebut that testimony, defendant has not shown plain error.

Defendant next contends that trial counsel was ineffective in various respects. Because defendant failed to raise this claim below in a motion for a new trial or an evidentiary hearing, review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

To prevail on a claim of ineffective assistance of counsel, defendant must show that his counsel's performance was objectively unreasonable and the representation was so prejudicial that he was deprived of a fair trial. To demonstrate prejudice, the defendant must show that, but for counsel's error, there was a reasonable probability that the result of the proceedings would have been different. This Court presumes that counsel's conduct fell within a wide range of reasonable professional assistance, and the defendant bears a heavy burden to overcome this presumption. [*People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001), *aff'd* 468 Mich 233 (2003) (citations omitted).]

Defendant first contends that trial counsel failed to file an appropriate motion under MCL 750.520j(2) so that two witnesses could be called at trial to testify that the complainant was a known prostitute, which testimony would corroborate defendant's claim that the complainant propositioned him and agreed to trade sex for drugs.

Evidence of the complainant's alleged prostitution is admissible where the defendant's theory of the case is that the complainant consented to an act of prostitution. *People v Slovinski*, 166 Mich App 158, 177-183; 420 NW2d 145 (1988). However, a strong objective showing of the complainant's employment as a prostitute at the time of the offense is required. *Id.* at 183. See also *People v Powell*, 201 Mich App 516, 520-521; 506 NW2d 894 (1993).

There is nothing in the record to show that defendant informed counsel of the existence of the proposed witnesses or that the proposed testimony of the witnesses was objectively sufficient to establish that the complainant was working as a prostitute at the time of the offense. Defendant's representations as to what the witnesses would have testified to is not sufficient to show "that these witnesses exist, or that their testimony would have benefited defendant had they been called. Thus, there are no errors apparent on the record. Therefore, defendant's argument that he was denied ineffective assistance of trial counsel is without merit." *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002).

Defendant also contends that counsel was ineffective for failing to obtain and introduce defendant's property receipt from the jail. According to defendant, the receipt would show that he had cigarettes in his possession when he was arrested and would impeach the victim's testimony that defendant asked her for a cigarette.

The record shows that counsel did not offer the property receipt into evidence. However, there is nothing in the record to show that the property receipt actually existed, that it listed cigarettes as an item taken from defendant, or that counsel was told about and asked to obtain the receipt. Moreover, the proposed evidence only related to a tangential matter – how the complainant and defendant first began speaking to one another – and did not tend to show that the complainant consented to the sexual encounter. Therefore, defendant has not shown that counsel's failure to introduce the evidence deprived him of a substantial defense. *People v Bass (On Rehearing)*, 223 Mich App 241, 252-253; 565 NW2d 897 (1997).

Defendant next contends that the trial court erred in sustaining the prosecutor's objection that certain testimony offered by defendant was inadmissible under MRE 609. A review of the record shows that defense counsel did not oppose the prosecutor's objection and agreed with the trial court's ruling that defendant's testimony was improper. Therefore, the issue has been waived. *People v Carter*, 462 Mich 206, 219-220; 612 NW2d 144 (2000). "A defendant may not waive objection to an issue before the trial court and then raise it as an error before this Court." *People v Fetterly*, 229 Mich App 511, 520; 583 NW2d 199 (1998).

Defendant's remaining claims were not raised below and thus have not been preserved for appeal. *People v Hogan*, 225 Mich App 431, 438; 571 NW2d 737 (1997). Because they concern proposed changes in general practice and procedure rather than specific errors in this case, we decline to address them.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Janet T. Neff
/s/ Helene N. White