

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROGER YOUNG,

Defendant-Appellant.

UNPUBLISHED

September 21, 2004

No. 248646

Wayne Circuit Court

LC No. 02-014742-01

Before: Cavanagh, P.J., and Smolenski and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for first-degree criminal sexual conduct, MCL 750.520b(1)(f) (force or coercion is used to accomplish sexual penetration). Defendant was sentenced as a fourth habitual offender, MCL 769.12, to twenty-two to forty years imprisonment. We affirm.

Defendant first argues that there was insufficient evidence to support the conviction. After de novo review, we disagree. See *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). “A reviewing court must consider not whether there was any evidence to support the conviction but whether there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt.” *Id.* at 722-723; see, also, *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002).

A person commits first-degree criminal sexual conduct if he engages in sexual penetration with another person using force or coercion and causes personal injury to the other person. *People v Perkins*, 468 Mich 448, 453; 662 NW2d 727 (2003). “Force or coercion” includes a situation in which “the actor overcomes the victim through the actual application of physical force or physical violence.” MCL 750.520b(f)(i); *People v Carlson*, 466 Mich 130, 140; 644 NW2d 704 (2002). “Personal injury” is defined as “bodily injury, disfigurement, mental anguish, chronic pain, pregnancy, disease, or loss or impairment of a sexual or reproductive organ.” MCL 750.520a(l); *People v Burton*, 433 Mich 268, 305; 445 NW2d 133 (1989). Defendant argues that there was insufficient evidence to find that he overcame the victim by force or coercion and that she suffered physical injury.

Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could conclude that sufficient evidence existed to support defendant’s conviction. The victim testified that immediately prior to the sexual assault, defendant punched her in the mouth,

followed her into the kitchen, and grabbed her around the neck forcing her face into the kitchen table. Defendant then stood her up against the kitchen counter with his hands still grasping her neck and penetrated her without consent. If the jury found these statements credible, this would be sufficient evidence to find that defendant overcame the victim through the actual application of physical force or physical violence. See *Carlson, supra*. Further, personal injury includes bodily injury or mental anguish, and need not be permanent or substantial. *People v Mackle*, 241 Mich App 583, 596; 617 NW2d 339 (2000). If the jury found these statements credible, there is sufficient evidence of “bodily injury” in this case. See *Burton, supra*.

Defendant next argues that the trial court improperly excluded rebuttal evidence. After review for an abuse of discretion, we disagree. *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996).

At trial, the prosecution admitted a letter that defendant had written to the victim regarding these proceedings. In the letter, defendant mentioned their alleged past sexual activity and money received from a battered women’s shelter. The trial court decided that if the victim denied the allegations in the letter, defense would not have the opportunity to impeach her. The trial court stated, “[I]t’s not relevant to what happened in this case.”

A party may contradict the answers that he has elicited from his adversary on cross-examination regarding matters germane to the issue. However, as a general rule, a witness may not be impeached regarding collateral, irrelevant, or immaterial matters. *People v Vasher*, 449 Mich 494, 504; 537 NW2d 168 (1995). Further, MRE 608(b) states:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. [*People v LeBlanc*, 465 Mich 575, 589; 640 NW2d 246 (2002).]

In this case, the victim testified that she had not done or participated in the sexual situations that defendant listed in the letter he wrote her telling her to drop the charges against him. She also testified that she had not received \$800 from the battered woman’s program, as defendant alleged in the letter. The alleged sexual encounters and alleged money received from a battered women’s shelter were not germane to the issue of whether defendant had sexually assaulted Reid on April 26, 2002. Once the victim denied the allegations, defense counsel could not challenge those answers. See *LeBlanc, supra* at 588. The trial court did not abuse its discretion when it prohibited defense counsel from admitting extrinsic evidence to impeach the victim on these collateral matters.

Next, defendant argues that he was denied effective assistance of counsel when trial counsel declined an instruction on the affirmative defense of consent. We disagree. Defendant has not fully preserved this issue for review. To fully preserve the issue for review, a defendant should move for a new trial or evidentiary hearing. *People v Sabin*, 242 Mich App 656, 658; 620

NW2d 19 (2000). Defendant moved for a *Ginther*¹ hearing, but his motion was denied. Further, defendant did not move for a new trial, and therefore, this Court's review is limited to the mistakes apparent on the record. *Id.* at 658-659.

To establish an ineffective assistance of counsel claim a defendant must show that the counsel's performance failed to meet an objective standard of reasonableness and that the deficient performance so prejudiced the defendant that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Effective assistance of counsel is presumed, and the defendant assumes a heavy burden of proving otherwise. *LeBlanc, supra* at 578.

In this case, the consent instruction would have been inconsistent with defendant's theory of the case. Defendant stated that he was not inside the house at the time the victim claimed he sexually assaulted her and that he did not commit the charged crime. Defendant did not argue that the sexual encounter the victim complained about was consensual, but instead argued that it never occurred. In fact, defendant's attorney claimed that defendant was never in the house and never committed the offense during his closing argument. Therefore, because defendant's theory of the case did not involve consent, defense counsel's failure to request the instruction was not deficient.

Defendant next argues that because he was not formally charged or convicted as a fourth habitual offender, he was not properly sentenced as an habitual offender. MCL 769.34(10) states that for a scoring issue to be preserved on appeal, defendant must have raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in this Court. Because, defendant did not raise this specific issue at or before sentencing, nor did he file a proper motion to resentence or to remand, he is foreclosed from raising this issue on appeal. *People v Wilson*, 252 Mich App 390, 392-393; 652 NW2d 488 (2002); *People v McGuffey*, 251 Mich App 155, 165-166; 649 NW2d 801 (2002).

Defendant next argues that the prosecutor engaged in misconduct. However, defendant failed to preserve his claim for review on appeal because he failed to object to the prosecutor's statements in the trial court. *People v McLaughlin*, 258 Mich App 635, 644-645; 672 NW2d 860 (2003). Appellate review of an unpreserved claim of prosecutorial misconduct is for plain error affecting substantial rights. Reversal is only warranted when a plain error resulted in the conviction of a truly innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceeding independent of the defendant's innocence. Thus, if a curative instruction could have alleviated any prejudicial effect, the appellate court will not find error requiring reversal. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003).

Defendant first argues that it was improper for the prosecutor to appeal to the sympathy of the jury. A prosecutor may not appeal to the jury to sympathize with the victim. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). However, the prosecutor's comments did not blatantly appeal to the jury's sympathy, and the comments were not so inflammatory as

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

to prejudice defendant. The comments were only a brief part of the overall case that the prosecutor presented. See *People v Mayhew*, 236 Mich App 112, 123; 600 NW2d 370 (1999). Further, the trial court properly instructed the jurors as to the evidence presented. Under these circumstances, even if improper, defendant was not prejudiced by the prosecutor's comments, and reversal is not required. *Watson*, *supra* at 591-592.

Defendant next argues that the prosecutor vouched for the credibility of the prosecution's witnesses. A prosecutor is not permitted to vouch for the credibility of a witness indicating that she has some special knowledge that the witness is testifying truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995); *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). A prosecutor may argue from the facts that a witness is credible. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). The prosecutor did not vouch for the credibility of the witnesses in stating that people see and hear things differently, she was merely indicating that testimony can differ. Further, in the statement that "it is not that they're lying they're mistaken," the prosecutor was summarizing the witness' testimony and not making a personal statement. Accordingly, the comments were not improper.

Defendant next argues that the prosecutor improperly attacked defense and defense counsel. A prosecutor is not permitted to personally attack defense counsel, *McLaughlin*, *supra* at 646, or the credibility of defense counsel, *People v Kennebrew*, 220 Mich App 601, 607; 560 NW 2d 354 (1996), or suggest that defense counsel is intentionally attempting to mislead the jury, *Watson*, *supra* at 592. A prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury, but may respond to defense counsel's arguments. *Id.* at 592-593. Although the prosecutor's "red herring" remark and comment about the testimony suggested that defense counsel was trying to distract the jurors from focusing on the evidence with an irrelevant theory, the remark was directly responsive to defense counsel's argument that defendant's DNA found in the semen was from a consensual sexual experience that took place earlier on April 26, 2002. The prosecutor based this characterization on a letter that defendant wrote in which he denied that there was a sexual encounter on April 26, 2002. Therefore, the prosecutor's "red herring" remark was not improper under the circumstances. See *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

Defendant next argues that the prosecutor improperly failed to lay foundation concerning the chain of custody of the blood and DNA evidence used at trial. Defendant argues that the prosecutor did not demonstrate a complete chain of custody, and therefore violated MPRC 3.5(A). First, there is no indication in the record that there was a break in the chain of custody. "A perfect chain of custody is not required for the admission of cocaine and other relatively indistinguishable items of real evidence." *People v White*, 208 Mich App 126, 132-133; 527 NW2d 34 (1994). Rather, "once a proper foundation has been established, any deficiencies in the chain of custody go to the weight afforded to the evidence, rather than its admissibility." *Id.* Nothing in the record in this instance suggests that the chain of custody was in any way broken.

Defendant also argues that the cumulative effect of the prosecutor's errors had a serious and substantial effect on the trial proceedings. In order to reverse on the ground of cumulative error, there must be errors of consequence that are severely prejudicial to the point that defendant was denied a fair trial. *Knapp*, *supra* at 387-388. Because prejudicial error has not been identified in this case, there can be no cumulative effect of errors requiring reversal. *Mayhew*, *supra* at 128.

Defendant next argues that the trial judge improperly interfered with the impartiality, integrity, and fairness of the trial. Because defendant failed to object to any of the complained-of comments or conduct, appellate review is precluded absent a showing of plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Plain error warrants reversal only where the error resulted in the conviction of an innocent defendant or if the error seriously affected the fairness, integrity or public reputation of judicial proceedings. *Id.*

First, defendant argues that the trial court erred in allowing the prosecutor to include the lesser-included offense of CSC III without having given reasonable notice. A party must object to the instruction before the jury deliberates to preserve an instructional issue for appeal. MCR 2.516(C); *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003). In this case, defense counsel waived the issue of jury instructions by stating that there was, "[n]o objection on behalf of the defence [sic]." A defendant who waives an instructional issue cannot obtain appellate review because an intentional relinquishment of the right waives the issue and extinguishes the error. *People v Hall (On Remand)*, 256 Mich App 674, 679; 671 NW2d 545 (2003).

Defendant next argues that the trial court erred in giving jury instructions on "last minute witnesses" that only pertained to his last minute witnesses and not to plaintiff's. Although the trial court has wide discretion over matters of trial conduct, that discretion is restricted to conduct which does not pierce the veil of judicial impartiality. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). A trial court's conduct pierces the veil of judicial impartiality where its conduct or comments are of such a nature that they unduly influence the jury and thereby deprive the defendant of a fair and impartial trial. *Id.*, citing *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988).

In this case, the trial judge merely gave context to the jury concerning the statements made by both the prosecutor and defense counsel. The trial court's comment regarding the witness's testimony did not "pierce the veil of impartiality." Because the trial judge was simply giving context to the questions of the attorneys, the comments were not likely to unduly influence the jury to the detriment of defendant. Therefore, defendant has failed to show plain error that affected his substantial rights. *Carines, supra*.

Finally, defendant argues that the trial court showed prejudice against him by indicating that the court would treat him like a "five year old child." However, this comment was made to defendant outside of the presence of the jury. Therefore, it did not pierce the veil of impartiality and did not unduly influence the jury to the detriment of the defendant. See *Paquette, supra*.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Donald S. Owens