STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v LANCE CRAIG MAHONE, Defendant-Appellant.	FOR PUBLICATION September 27, 2011 9:00 a.m. No. 299056 Oakland Circuit Court LC No. 2009-229775-FC

Before: RONAYNE KRAUSE, P.J., and CAVANAGH and JANSEN, JJ.

RONAYNE KRAUSE, P.J.

Defendant was convicted by a jury, after a combined trial with his codefendant Evan Jerome Burney,[1] of two counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b, and one count of unarmed robbery, MCL 750.530. Trial was, for the most part, a credibility contest between defendant and the victim. The jury apparently found the victim credible. Defendant appeals his convictions by right, and we affirm.

The victim was working as a prostitute at the time, a fact fully explored before the jury by both the prosecution and the defense. The codefendants at least initially sought to procure her services as such based on an online advertisement that had been placed by the victim's working partner. It was also extensively explored before the jury that the advertisement was highly misleading as to physical appearance. The victim testified that she refused to see two customers at once, whereupon the codefendants initially left, but then returned, tricked her into opening the door, robbed her of her cell phone and computer, and sexually assaulted her, only to be interrupted by the arrival of another customer. Defendant testified that the interaction had been completely consensual until interrupted by the other customer's arrival, but he and Burney took their money back afterwards and, unbeknownst to defendant until they got back to their car,

[1] This Court affirmed Burney's convictions but remanded for resentencing in his separate appeal. *People v Burney*, unpublished opinion per curiam of the Court of Appeals, issued August 25, 2011 (Docket No. 298620). *Burney* is not binding and we have not considered it in deciding the instant appeal, but we note that the *Burney* panel resolved the alternate-juror issue, the only issue these appeals have in common, in accord with our own resolution *infra*. Although we will refer to both Burney and Mahone jointly as "codefendants," we refer only to Mahone as "defendant."

Burney took the cell phone and computer. The defense theory was essentially that the victim invented the claimed sexual assault as vengeance for the theft and the refusal to pay.

Defendant argues that the trial court erred in admitting several instances of inadmissible hearsay evidence, thereby requiring a new trial. We agree that in a case that turns entirely on the jury's determination of relative credibility, any error would be very difficult to deem harmless. However, to the minimal extent there may be any evidentiary errors in this matter, they were, or could have been, corrected by curative instructions. We find no basis for reversal.

Defendant first argues that inadmissible and prejudicial hearsay was admitted through the testimony of a police officer, who testified that she confirmed with unidentified inhabitants of an adjacent hotel room that they had heard a disturbance. The officer initially testified that the victim had stated that she screamed and that the neighbors had said they heard screaming, but the inadmissible statements were stricken and the jury instructed to disregard it. Jurors are presumed to follow their instructions. See *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). The prosecutor discussed the officer's confirmation of "a disturbance" during closing argument, but the prosecutor did not state that the officer had confirmed screaming, and in any event, this was a fair response to defendant's explicit testimony that there was no screaming and, by implication, no disturbance.

Defendant also argues that further inadmissible hearsay was admitted through the same officer's testimony that the victim said she had been threatened with a large vodka bottle. This is a closer question, because the officer did, in fact, testify that the victim "said that it had been used, um, in a threatening manner." Defense counsel immediately objected, but the trial court did not rule on the objection; instead, the prosecutor immediately rephrased the question. Significantly, the officer's testimony was not responsive. The officer was only asked whether she had been directed to a bottle, not why she had. In any event, unresponsive answers may "'work a certain amount of mischief with the jury,'" but they are generally not considered prejudicial errors unless egregious or not amenable to a curative instruction. *People v Barker*, 161 Mich App 296, 305-307; 409 NW2d 813 (1987), quoting 2 Gillespie, Michigan Criminal Law & Procedure (2d ed), § 600, pp 203-204; see also *People v Waclawski*, 286 Mich App 634, 709-710; 780 NW2d 321 (2009). We do not find this testimony egregious, and although the statement could easily have been stricken, defense counsel did not make a request to strike, possibly because at that point, it would have simply drawn more attention to the statement. The officer's testimony was not a prejudicial error.

However, we disagree with the prosecutor's argument that it was admissible pursuant to MRE 801(d)(1)(B). Under that court rule, a statement is admissible if four elements are satisfied: "(1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony; (3) the proponent must offer a prior consistent statement that is consistent with the declarant's challenged in-court testimony; and, (4) the prior consistent statement must be made prior to the time that the supposed motive to falsify arose." *People v Jones*, 240 Mich App 704, 707; 613 NW2d 411 (2000) (citations omitted). The fourth element is not met here, because the "supposed motive to falsify" was the codefendants' claimed refusal to pay and subsequent theft of the victim's cell phone and computer when they left the hotel room after

being interrupted. Consequently, the charged motive to falsify would have arisen before the victim talked to the officer.

In contrast, defendant's next assertion of inadmissible hearsay was admissible pursuant to MRE 801(d)(1)(B). The victim's co-worker, who was responsible for receiving contacts from customers and directing them to the victim, testified that the victim called her shortly after the co-worker had directed defendant to the victim's hotel room. The co-worker testified, consistent with the victim's own testimony, that the victim told the co-worker that she had not been expecting two customers to arrive and would call the co-worker back. Significantly, defendant's testimony was that the victim admitted him and Burney without any complication, thereby impliedly charging the victim with fabricating her testimony about the telephone call. And critically, this telephone call would have occurred *before* the victim would have had any motive to falsify, no matter which version of events is correct. The co-worker's testimony about the victim's telephone call was properly admitted.

Defendant also argues that statements the victim made to the nurse who conducted a rape examination should not have been admitted. Statements made for the purpose of medical treatment are admissible pursuant to MRE 803(4) if they were reasonably necessary for diagnosis and treatment and if the declarant had a self-interested motivation to be truthful in order to receive medical treatment, completely irrespective of whether the declarant sustained any immediately apparent physical injury. *People v Garland*, 286 Mich App 1, 8-10; 777 NW2d 732 (2009). Particularly in cases of sexual assault, where injuries might be latent, such as sexually transmitted diseases, or psychological and thus not necessarily physically manifested at all, a victim's complete history and a recitation of the totality of the circumstances of the assault are properly considered statements made for medical treatment. *Id*. at 9-1; *People v McElhaney*, 215 Mich App 269, 282-283; 545 N W 2d 18 (1996). The statements the victim made to the nurse were all properly admissible pursuant to MRE 803(4).

Finally, defendant argues that he was denied his right to a fair trial by the trial court's removal of a juror after the jury had begun deliberations, and that juror's replacement with the alternate juror instead of granting a mistrial. Although we would have preferred a better record, we do not find that the trial court abused its discretion or denied defendant a fair trial. The trial court's decision whether to remove a juror is reviewed for an abuse of discretion. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001). Constitutional issues are reviewed de novo. *People v Idziak*, 484 Mich 549, 554; 773 NW2d 616 (2009).

During voir dire, the juror explained that she had friends who were victims of sexual assault and who had been accused of sexual assault, but she indicated that she could be fair and impartial, although she was pregnant and would have a hard time paying her bills if she missed many days of work. After the jury was charged, it requested that the victim's telephone call to 911 be replayed twice. It requested that defendant's testimony be replayed, but changed its mind after re-reviewing CJI2d 8.1 (intentional assistance) and CJI2d 18.2 (unarmed robbery). The juror then sent a note that stated in relevant part:

> I need to be dismissed/removed from the Jury at this time. Mentally I am <u>really</u> unable to proceed in this case. I feel myself about to have another mental breakdown and it's not good for me and my unborn child. (Stress). I cried over

> the break and can't really stop crying and talking to one of the other Jurors it all came out and my true feelings and personal biases is really taking an infact [sic] and I don't think its fair. I am stressing myself out + my stomach is feeling pain. So I am scared that I am going to go into early labor because the case is taking a toll on me. I am unable to put behind me my personal + past experiences in coming to a lodgical [sic] conclusion. Please can you please remove me + because of this I am putting our delibeattion [sic] at a stand by.

She was brought back to the courtroom by herself and explicitly told not to discuss how the voting stood but that she was going to have to explain why she felt she could not deliberate.

Unfortunately, neither the court nor any of the attorneys thought to ask her, directly and in so many words, whether she was experiencing stress because she held a minority viewpoint, irrespective of what that viewpoint might have been. However, contrary to defendant's pure speculation, the record that was made strongly suggests otherwise, particularly given her direct and explicit denial that she was being maltreated by the other jurors. In fact, the more rational interpretation of the juror's statements would be that she may not have held a view at all. It is abundantly clear from the record that the juror was experiencing more than sufficient physical and emotional strain to warrant her removal from the jury, even absent her unambiguous explanation that she simply could not continue deliberating. The record shows that the juror simply grossly underestimated the extent to which she would become emotionally entangled when trying to reach an actual conclusion about the evidence, and she tried to do the right thing. The trial court did not abuse its discretion by removing the juror.

Defendant argues that there was a danger, or perhaps an actuality, of the alternate juror being coerced by the other jurors, in reliance on *Tate*, 244 Mich App at 564. At the time *Tate* was decided, MCR 6.411 did not permit an alternate juror, once discharged, to be recalled, although subsequent reversal of a conviction would only be required if the procedure actually prejudiced the defendant. *Tate*, 244 Mich App at 564. However, MCR 6.411 was amended a few months later and now explicitly permits the trial court to retain the alternate juror, and it merely requires that if the alternate juror replaces a juror after deliberations had begun, the trial court must instruct the jury to begin its deliberations anew. This is consistent with the then-recently-modified FR Crim P 24(c)(3). *Id*. at 563 n 1, 565.

Here, the portion of the transcript where the alternate juror was selected was not transmitted to us, and it appears that the trial court's instruction to begin deliberations anew was not transcribed at all. However, it is clear from the record we have that the alternate juror was properly instructed not to discuss the case or review any media about the case, the alternate juror complied with that instruction, and the jury was, in fact, properly instructed to begin deliberations anew. Defendant does not argue that the jury or the juror were not properly instructed. The jury is presumed to have followed its instructions.

We find no indication in the record that the jury could not or did not follow that instruction. Because it is again pure speculation that the alternate juror was coerced, we do not find that defendant was prejudiced by the substitution of the alternate juror.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen