STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY LEE HICKS,

Defendant-Appellant.

UNPUBLISHED
May 23, 1997

No. 192116
Calhoun Circuit Court
LC No. 95-0557FC

Before: Young, P.J., and Doctoroff and Cavanagh, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction of first-degree criminal sexual conduct, MCL 750.520(b)(1)(f); MSA 28.788(2)(1)(f). We affirm.

I

Defendant claims that the trial court denied him his right of confrontation by refusing to allow him to impeach the victim with an allegedly inconsistent statement that she gave police. We disagree.

Defendant contends that he should have been allowed to introduce evidence that the victim told police that she offered oral sex to defendant in exchange for $30. Defendant sought to introduce such evidence to impeach the victim's trial testimony that she got into defendant's car so that he could drive her home. However, in this case, defendant's defense was alibi, not consent. That being so, the reason the victim entered defendant's car was a collateral matter; exposing the fact that this crime began as a solicitation for prostitution was not material to his defense. A defendant's right of cross-examination is not absolute; impeachment of a witness regarding a collateral matter is within the trial court's discretion. *People v Wofford*, 196 Mich App 275, 281; 492 NW2d 747 (1992).

Further, the trial court's decision to preclude defendant's cross-examination as to the victim's alleged statement to police that she entered defendant's vehicle to engage in prostitution is supported by MRE 403. Assessing probative value against prejudicial effect requires a balancing of factors, including whether the fact can be proven another way. *People v Oliphant*, 399 Mich 472, 490; 250 NW2d 443 (1976). In determining whether evidence should be admitted under MRE 403, the court must

consider the importance of the fact sought to be established and how directly the proffered evidence tends to establish it. *Oliphant, supra,* 490. As set forth above, defendant sought to impeach the victim on a collateral matter. Thus, the fact sought to be established was not of high importance to defendant's case. In addition, the evidence of plaintiff's alleged solicitation could be highly prejudicial to her claim of rape. We find no error in the trial court's decision to exclude the testimony.

II

Defendant next claims that the trial court erred and denied him a fair trial by ruling that no prejudice resulted from the prosecutor's failure to reveal that Niswander, a prosecution witness, received the benefit of a plea bargain. We disagree.

Some evidence is so clearly supportive of a claim of innocence that it gives rise to a duty to disclose on the part of the prosecution regardless of a discovery request. *United States v Agurs*, 427 US 97; 96 S Ct 2392; 49 L Ed 2d 342, 351 (1976). The test is whether the undisclosed evidence is material. *United States v Bagley*, 473 US 667; 105 S Ct 3375; 87 L Ed 2d 481 (1985). However, the "mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." *Agurs*, 427 US 109-110. "If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial." *Id*., 427 US 112-113. "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 US 669.

At trial, witness Niswander testified that he found the victim at the side of the road on the morning of August 17, 1994. She was crying and was cut and bruised. The victim told Niswander that she had been raped. Niswander then gave the victim a ride to her boyfriend's house. Although the prosecution maintained that Niswander wanted to testify at trial, defendant sought to disclose a plea bargain reached with Niswander regarding unrelated charges against him.

Review of the evidence demonstrates that, in light of the overwhelming evidence against defendant, disclosure to the jury that Niswander had received favorable treatment from the prosecutor would not have changed the result of defendant's trial. The victim identified defendant as her attacker. When her attacker drove away she saw his license plate number, which she was still able to recite at trial. The victim described her attacker's vehicle as an early 80s Grand Prix, painted two-tone green, with the hood and trunk being darker than the side panels. The victim described her attacker to police as having worn sweat pants, a T-shirt, a flannel shirt, dirty white tennis shoes, and having dirty blonde hair. Police subsequently found defendant, who matched the victim's description of her attacker. He was driving the same green car and was wearing sweat pants. In addition, in defendant's car, police found an unopened condom similar to the one which defendant used with the victim.

In light of the compelling nature of the testimony of the victim and the police officer who investigated the crime, we conclude that Niswander's testimony was not so crucial that the prosecutor was obligated to disclose the plea bargain. We also note that Niswander was not an eyewitness to the

crime nor did his testimony rebut defendant's alibi witnesses because he discovered the victim sometime after the attack. Neither Niswander nor the victim testified as to how much time passed between the attack and Niswander's arrival.

III

Defendant next argues that the trial court abused its discretion by denying his motion for a new trial because of allegedly newly discovered evidence in the form of DNA test results excluding him as the source of the bloodstains on the victim. This argument is without merit.

The DNA evidence in this case indicated that the blood found on the victim's shirt belonged to the victim. Because the blood belonged to the victim, the possibility that the blood was that of defendant was obviously ruled out. This was not a case in which the bloodstains were attributable to a third party, the probable perpetrator. However, defendant contends that he should have been granted a new trial based on the "new evidence" that the DNA test indicated that the blood on the victim's shirt could not belong to defendant.

A party is entitled to a new trial when he can show newly discovered evidence that would render a different result to be probable on retrial. MCR 2.611(A)(1)(f); *People v Barbara*, 400 Mich 352, 362; 255 NW2d 171 (1977). Defendant does not dispute that the prosecutor had informed his trial counsel of the first conclusion, i.e., that the bloodstains matched the victim; his argument is that the second conclusion, i.e., that defendant was excluded, was a new one. The trial court concluded that because the second conclusion is a logical extension of the first, it is not new. Defendant fails to demonstrate any error in the trial court's reasoning. Defendant failed to offer any proofs that would provide any other way to interpret the report.

Defendant's argument comparing this case to *People v Jackson*, 91 Mich App 636; 283 NW2d 648 (1979), is unpersuasive because that case involved semen stains. Evidence that semen did not match the defendant's genetic pattern was compelling because the semen obviously had to originate from a third party, not possibly coming from the female victim. The present case, however, involves blood that could have come from the victim, and, because it did, the conclusion that it did not come from defendant is rendered meaningless.

IV

Defendant next claims that the trial court erred by ruling that he was not denied effective assistance of counsel. We disagree.

We reject defendant's claim that he was denied effective assistance of counsel by his trial counsel's failure to object to bindover at his initial preliminary examination. Circumstantial evidence and reasonable inferences may be sufficient to justify a bindover. *People v Coddington*, 188 Mich App 584, 591; 470 NW2d 478 (1991). Thus, the eyewitness testimony from the victim in this case satisfied the "some evidence" for bindover test. In other words, even assuming defendant's trial counsel's performance was deficient, defendant has failed to demonstrate that, "but for counsel's errors, the result

of the proceedings would have been different." *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674, 693 (1984).

In addition, we reject defendant's claim that he was denied effective assistance of counsel by defendant's failure to present additional evidence to preserve his right to a second preliminary examination. Here, as below, defendant fails to demonstrate how the result would have been different had his trial counsel offered additional evidence. Similarly, we reject defendant's claim that he was prejudiced because the trial court abandoned an issue that it wanted to research in light of trial counsel's failure to object to bindover. Defendant does not indicate what that issue was, how, or even if, the resolution of that research issue would have altered the outcome.

For the reasons stated above, we reject defendant's claim that he was denied effective assistance of counsel by his trial counsel's failure to discover Niswander's plea bargain as well as his failure to demand pretrial production of the final DNA report. We also reject defendant's claim that the cumulative effect of all of these alleged errors denied him a fair trial. As set forth in this opinion, the alleged instances of ineffective assistance were either non-existent or caused no prejudice. Thus, reversal is not warranted.

Affirmed.

/s/ Robert P. Young, Jr.
/s/ Martin M. Doctoroff
/s/ Mark J. Cavanagh