

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT WESENER,

Defendant-Appellant.

UNPUBLISHED

June 13, 1997

No. 177625

Saginaw Circuit Court

LC No. 94-008719-FC

Before: Sawyer, P.J., and Murphy and Cavanagh, JJ.

PER CURIAM.

Defendant appeals by right from his convictions by jury of three counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b; MSA 28.788(2), one count of aggravated assault, MCL 750.81a; MSA 28.276(1), and one count of possession of a firearm during the commission of a felony, MCL 750.227(b); MSA 28.424(2). Defendant was sentenced to seventeen to thirty years' imprisonment on the CSC I convictions, one concurrent year on the aggravated assault conviction and two consecutive years on the felony-firearm conviction. We affirm.

Defendant first argues that the trial court erroneously excluded evidence showing that the victim believed that the prosecution would not bring an unrelated felony charge against her if she testified against defendant. During her testimony, the victim denied that the prosecution had granted or promised her any favors in exchange for her testimony. After the victim's testimony, defense counsel sought to introduce the testimony of Edie Chaltraw and Melinda Hammond, who alleged that the victim had told them that she was testifying pursuant to a deal with the prosecution whereby she would not be prosecuted on an unrelated charge if she testified against defendant. The trial court excluded Chaltraw's and Hammond's testimony because the victim had not been confronted with their allegations during her earlier testimony. Defendant argues that the trial court erroneously determined that MRE 613(b) mandated that extrinsic evidence of the victim's prior inconsistent statement could not be introduced until after she was given the opportunity to explain or deny the statement. However, in light of the evidence against defendant, including forensic evidence, we are satisfied that any error was harmless beyond a reasonable doubt. *People v Minor*, 213 Mich App 682, 685; 541 NW2d 576 (1995).

Defendant next argues that the prosecution knowingly allowed the victim to falsely testify that she had not been promised anything in exchange for her testimony. However, the underlying factual premise of defendant's argument, i.e. that the victim in fact lied when she testified that she was not receiving consideration from the prosecution for her testimony, is merely an allegation. While authority cited by defendant establishes that where the prosecution knowingly allows false testimony to remain uncorrected on the record, the defendant's due process rights are violated and he must be afforded a new trial, in each case upon which defendant relies, the fact that there was false testimony was uncontroverted. See, *Napue v Illinois*, 360 US 264; 79 S Ct 1173; 3 L Ed 2d 1214 (1959) (prosecution admitted witness had been promised consideration); *Giglio v United States*, 405 US 150; 92 S Ct 763; 31 L Ed 2d 104 (1972) (prosecution indicated witness had been promised leniency but witness testified that he had not); *People v Weise*, 425 Mich 448, 453-456; 389 NW2d 866 (1986) (promise made to witness was placed on the record when he entered guilty plea). Here, there is only defendant's bare allegation that the victim's testimony was false. Consequently, defendant's argument that he must be afforded a new trial because the prosecution failed to correct the victim's allegedly false testimony is not persuasive. *People v Johnson*, 451 Mich 116, 124; 545 NW2d 637 (1996).

Finally, defendant argues he was denied the effective assistance of counsel where his trial attorney failed to lay a proper foundation for the admission of Hammond's and Chaltraw's testimony. We disagree. While defendant fails to articulate what the proper foundation would have been, we assume that defendant means his trial counsel failed to confront the victim with the statements she allegedly made to Hammond and Chaltraw during her testimony because that failure was the basis of the trial court's ruling excluding their testimony. However, as already discussed, it was unnecessary to confront the victim with these statements prior to eliciting Chaltraw's and Hammond's testimony and the trial court erred in its ruling in this regard. Consequently, defendant has not shown that his trial counsel's performance was deficient. Therefore, his claim of ineffective assistance of counsel is without merit.

Affirmed.

/s/ David H. Sawyer
/s/ William B. Murphy
/s/ Mark J. Cavanagh