# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

RODRICK ROBERT STRELAU,

Defendant-Appellant.

UNPUBLISHED
August 1, 1997

No. 171679
Oakland Circuit Court
LC No. 93-122706

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Before: Gribbs, P.J., and Sawyer and Young, JJ.

PER CURIAM.

A jury convicted defendant of second-degree criminal sexual conduct, MCL 750.520c; MSA 28.788(3). Defendant was sentenced to two and one half to fifteen years' imprisonment. Defendant appeals as of right. We affirm.

Defendant assaulted his estranged wife who was four and one half months pregnant. According to the complainant, defendant threw her to the ground, lifted her skirt, pulled down her nylons and underwear, and touched her vagina.

Defendant first raises multiple instances in which he argues he was denied the effective assistance of counsel. We do not find any merit to his arguments. Each instance that defendant raises was either trial strategy, which we decline to review, or did not prejudice the defendant in any way. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Defendant next argues that the trial court erred in striking his motion for a new trial as being untimely. Even assuming arguendo that there is merit to defendant's claim, any error was harmless. After striking defendant's motion as untimely, the trial court held a *Ginther*[1] hearing and, on its merits, again denied defendant's motion for a new trial based upon the ineffective assistance of counsel. The other issues raised by defendant in his motion for a new trial have been raised on appeal, and we find them to be without merit. Accordingly, any error was harmless.

Defendant also argues that he was denied his right to a fair trial because he was prevented from questioning the complainant, his estranged wife, about an incident that happened two days before the

CSC incident. Defendant raised this issue during pre-trial motions and the trial court reserved its ruling for a later time, and instructed defendant to raise this issue again later. Defendant failed to do so, and therefore, has not preserved this issue for appellate review. Because the record indicates that defendant had the opportunity to raise the issue during trial, no manifest injustice will result from our failure to review this issue. *People v King*, 210 Mich App 425, 432; 534 NW2d 534 (1995).

Defendant also argues that he was denied due process and a fair trial because the police testified about evidence that had been destroyed. We note at the outset that defendant did not object to the testimony below and therefore, we review the issue for manifest injustice. Unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law. *Arizona v Youngblood*, 488 US 51, 58; 109 S Ct 333; 102 L Ed 281 (1988). Because defendant does not offer any evidence to indicate bad faith on the part of the police, nor does the record indicate any, manifest injustice will not result by this Court's failure to review this issue. *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993).

Defendant next argues that the trial court erred in failing to grant a mistrial, or instruct the jury to disregard the evidence, when the complainant testified about a subsequent physical attack on her. We disagree and note that defendant did not object to the complainant's testimony nor did he request a jury instruction.

Since defendant failed to request a mistrial on this basis, this Court will not reverse absent manifest injustice. *People v Wise*, 134 Mich App 82, 105; 351 NW2d 255 (1984). Nor will this Court reverse the trial court's failure to give an unrequested jury instruction absent manifest injustice. *Haywood, supra* at 230. In any case, an unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial. *Id*. We find no manifest injustice.

Defendant also argues that the trial court erred when it allowed in the testimony of the two attending nurses and the police officers because the testimony was hearsay and did not fall under the hearsay exception of statement made for medical purposes, MRE 803(4). Again, no objection was raised below. See *People v Todd*, 186 Mich App 625, 629: 465 NW2d 380 (1980). Although there was no reasonable necessity for defendant to be identified as the attacker, manifest injustice did not occur since the challenged testimony was merely cumulative to that of the complainant's testimony. *People v Van Tassel* (*On Remand*), 197 Mich App 653, 655; 496 NW2d 388 (1992).

Defendant next argues that the trial court abused its discretion in making its sentencing determination. Because defendant did not present unusual circumstances that would justify a downward departure to the sentencing judge, this issue may not be raised on appeal. *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992).

Defendant finally argues that he was denied his rights under MCR 6.425 because he was not given the opportunity to review the PSIR before sentencing, and therefore, his sentence must be vacated and this case remanded for resentencing. We disagree.

MCR 6.425(B) in pertinent part states:

> The court must permit the prosecutor, the defendant's lawyer, and the defendant to review the presentence report at a reasonable time before the day of sentencing.

MCR 6.425(D)(2)(a) requires the court at sentencing to confirm on the record that the defendant, his attorney, and the prosecution have had an opportunity to read and discuss the PSIR. The staff comments to this provision state the following:

> The provision found in former 6.101(G) declaring that a failure to comply with the provisions of that subrule "shall require resentencing" has been deleted from this subrule. Whether failure to comply with a provision in this subrule will entitle a defendant to resentencing depends on the nature of the noncompliance and must be determined by reference to past case law or on an individual basis.

In *People v Syakovich*, 182 Mich App 85; 452 NW2d 211 (1989), the defendant argued that he did not have the opportunity to review the report pursuant to MCR 6.101(K), now MCR 6.425. This Court disagreed and held that the sentencing transcript showed that defense counsel had reviewed the report and that he did not have any disagreements with it. *Id*. at 90. Furthermore, the defendant had not raised the issue in his motion for resentencing and did not order that the motion hearing be transcribed. *Id*.

In the case at bar, the trial court did not confirm on the record that defendant read the presentence report. Thus, whether defendant is entitled to resentencing is determined by reference to past case law or on an individual basis. Similar to *Syakovich*, defense counsel indicated he had reviewed the report and found no inaccuracies. Furthermore, defendant does not cite any inaccuracies with the report on appeal. Moreover, the trial court allowed defendant the opportunity to speak and defendant freely raised numerous issues in his own defense, which were also set forth in the report. Thus, based upon case law and the circumstances of this case, defendant is not entitled to resentencing.

Affirmed.

/s/ Roman S. Gribbs
/s/ David H. Sawyer
/s/ Robert P. Young, Jr.

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