

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM LEE JACKSON,

Defendant-Appellant.

UNPUBLISHED

November 21, 1997

No. 196979

Recorder's Court

LC No. 95-4475

Before: Griffin, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). Defendant was sentenced to six to twenty years' imprisonment. We affirm.

Defendant's initial argument on appeal is that three instructional errors warrant reversal of his conviction. First, defendant argues that the trial court erred in failing to instruct the jury that it should consider whether defendant's confessions were ever given and whether they were truthful. Defendant never requested such an instruction. A jury's verdict will not be set aside on the ground that the trial court failed to instruct the jury on any point of law unless the defendant properly requested such instruction. *People v Hendricks*, 446 Mich 435, 440-441; 521 NW2d 546 (1994). When no objection is posed to the instructions as given, this Court will not review an instructional error absent manifest injustice. *People v Hess*, 214 Mich App 33, 36; 543 NW2d 332 (1995). After reviewing the record, we are not persuaded that any manifest injustice occurred. At a pretrial evidentiary hearing, the trial court determined that defendant's written and oral confessions were voluntary; the court noted that defendant had been advised of his rights, had read those rights, and, thereafter, voluntarily and intelligently waived those rights. Consequently, once the trial court admitted the statements, it was up to the jury to determine what weight should be given to the evidence. In this respect, we note that the trial court properly instructed the jury regarding the weight and credibility to be given to defendant's testimony. Therefore, we decline to further address this claimed instructional error.

Next, defendant contends that the trial court committed error by failing to instruct the jury on the lesser included offense of second-degree criminal sexual conduct. A review of the record indicates that defendant did not request an instruction regarding lesser offenses. With the exception of first-degree murder cases, a trial court is under no obligation to instruct on a lesser included offense absent a request by defendant. *People v Henry*, 395 Mich 367, 374; 236 NW2d 489 (1975). In any case, we note that such an instruction would have been inconsistent with the evidence and defendant's theory of the case. Second-degree criminal sexual conduct is not a necessarily included lesser offense of first-degree criminal sexual conduct, but is instead a cognate lesser included offense. *People v Wilhelm*, 190 Mich App 574, 577; 476 NW2d 753 (1991). The Supreme Court has noted that a trial court should only instruct on a cognate lesser included offense if the court determines that the evidence adduced at trial would support a conviction of the cognate offense. *People v Beach*, 429 Mich 450, 463-464; 418 NW2d 861 (1988). In this case, there was evidence of anal penetration. Defendant did not dispute this fact, but rather argued that he never touched the victim in a sexual manner. Given these circumstances, an instruction on the lesser offense of second-degree criminal sexual conduct would have been inappropriate. Therefore, we find that the trial court did not commit reversible error.

Defendant further contends that trial court, when instructing the jury, misstated the charges against him, thereby effectively amending the information. We disagree. This Court reviews jury instructions in their entirety to determine whether there is error requiring reversal. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). Reversal is not required where the jury instructions, taken as a whole, sufficiently protect the defendant's rights. *People v Moldenhauer*, 210 Mich App 158, 159; 533 NW2d 9 (1995). Defendant was originally charged with three counts of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct. In Count I, defendant was charged with using his penis to penetrate the anal opening of the infant victim. In Count II, defendant was charged with using his finger to penetrate the girl's vagina and, in Count III, defendant was charged with using his finger to penetrate her anal opening. The charges were read to the jury on three separate occasions. On one occasion, the trial court misspoke and stated that in Count I, defendant was charged with using his penis to penetrate the victim's genital opening. Although there does, therefore, appear to be one isolated misstatement in the instruction, we find that the instruction as a whole was accurate. Moreover, defendant does not contend that the verdict form, which specified the type of penetration charged, was in error. Accordingly, this Court finds that the jury was properly instructed as to the charges against defendant.

Defendant's next argument on appeal asserts that in closing argument the prosecutor improperly expressed her personal opinion on the credibility of witnesses and on defendant's guilt, relied upon facts not in evidence, shifted the burden of proof onto defendant and denigrated defendant and his counsel. At the time of trial, defendant did not object to any alleged misconduct on the part of the prosecution. It is well settled that the absence of objection during trial precludes appellate review of prosecutorial comments unless the prejudicial effect of the statements was so great that it could not have been cured by a cautionary instruction and failure to consider the issue would result in a miscarriage of justice. *People v Nantelle*, 215 Mich App 77, 86; 544 NW2d 667 (1996). We have carefully reviewed the record and find that defendant was not denied a fair and impartial trial by the prosecutor's statements in closing argument. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). The

prosecutorial comments cited by defendant were proper because they were reasonable inferences to be drawn from the evidence presented at trial. *People v Caldwell*, 122 Mich App 618, 620; 333 NW2d 105 (1983). Defendant's claim is without merit.

Next, defendant contends that the trial court erred in denying the jury's request to reread the substantial testimony of three witnesses, including defendant, without ascertaining the reasons why the jury was prompted to ask for a reread. As a preliminary matter, we note that defendant failed to object to the trial court's refusal to reread the testimony. Thus, review is denied absent extraordinary or compelling circumstances. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). We do not believe that such circumstances exist in the present case.

As a general rule, when a jury requests the rereading of trial testimony, whether and to what extent the testimony should be read are matters within the discretion of the trial court. *People v Davis*, 216 Mich App 47, 56; 549 NW2d 1 (1996). A trial court abuses its discretion when it denies a request to rehear testimony and forecloses the possibility that the jury's request will later be granted. *People v Robbins*, 132 Mich App 616, 618; 347 NW2d 765 (1984). In this case, the trial court, pursuant to MCR 6.414(H), encouraged the jury to continue in its deliberations and did not foreclose the possibility that a reread of the testimony might be possible if, after having done as instructed, the jury still had difficulty recalling the testimony. Moreover, the court properly considered the need for the reread and the delay which might occur in the event that it were to grant the request. In *People v Joseph*, 114 Mich App 70, 75; 318 NW2d 609 (1982), a panel of this Court recognized that it is not an abuse of discretion for a trial court to deny a reread request if the trial court takes into consideration two competing factors: "the time that would be spent reviewing the testimony and the juror's need for the material." *Id.* We find no abuse of discretion.

Finally, defendant argues that he was denied effective assistance of counsel by trial counsel's failure to object to the instructions as given, failure to object to comments made by the prosecution, and failure to object to the court's denial of the jury's request to reread the testimony. Generally, a motion for new trial or an evidentiary hearing is required before this Court will review a claim of ineffective assistance of counsel. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989). However, where the record contains sufficient details relating to the alleged deficiencies in representation to allow this Court to adequately analyze the issue, the absence of a motion for new trial will not preclude appellate review. *People v Laidlaw*, 169 Mich App 84, 95; 425 NW2d 738 (1988). Although defendant did not file a motion for new trial or seek an evidentiary hearing in the trial court, we will review this issue because the record contains sufficient detail to do so.

To establish ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning in a manner consistent with the Sixth Amendment. *Daniel, supra* at 58. The deficiency must be prejudicial to the defendant. *Id.* Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Specifically, the defendant must overcome the presumption that the challenged action is sound trial strategy. *Daniel, supra*. In the present case,

defendant has failed to show how trial counsel's performance deprived him of a fair trial. As noted above, the jury instructions adequately and fairly presented the issues to be tried and sufficiently protected the rights of defendant. Therefore, failure to object to the instructions as given or to request additional instructions did not deny defendant a fair trial with a reliable result. Furthermore, the comments made by the prosecution did not rise to the level of misconduct. Instead, we find that they were based upon the facts in evidence and on reasonable inferences drawn therefrom. Finally, the trial court did not abuse its discretion in denying the jury's request to reread the testimony of three witnesses. Accordingly, we conclude that defendant was not denied effective assistance of counsel.

Affirmed.

/s/ Richard Allen Griffin

/s/ David H. Sawyer

/s/ Peter D. O'Connell