

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAFAYETTE WILLIAM CURRIE, a/k/a  
LAFAYETTE WILLIAM CURRY,

Defendant-Appellant.

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UNPUBLISHED

July 21, 1998

No. 187271

Washtenaw Circuit Court

LC No. 93-000481 FC

Before: MacKenzie, P.J., and Whitbeck and G.S. Allen, Jr. \*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). He was sentenced to fifteen to thirty years' imprisonment and now appeals as of right. We affirm.

Defendant first contends that the trial court erroneously denied his motion for new trial, made on the ground that the verdict was against the great weight of the evidence. Whether to grant a new trial on this basis is within the trial court's discretion, and its decision will not be reversed absent a clear abuse of discretion. *Bosak v Hutchinson*, 422 Mich 712, 737; 375 NW2d 333 (1985). In the present case the victim's contention that defendant sexually assaulted her remained firm throughout trial and was supported by other evidence, including medical testimony that certain physical abnormalities she had were consistent with nonconsensual sexual intercourse. The trial court did not abuse its discretion by denying defendant's motion.

Defendant next argues that prejudicial error resulted from the trial court's decision to allow the victim to testify regarding defendant's prior alleged sexual misconduct toward her. MRE 404(b)(1). The trial court did not abuse its discretion in determining that the challenged evidence satisfied the requirements of *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994), and was admissible to place in context the relationship between defendant and the victim

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\* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

before the crime occurred, and to show defendant's plan, scheme and design. *People v Catanzarite*, 211 Mich App 573, 579; 536 NW2d 570 (1995).

Defendant further maintains that he was denied his right to a fair and impartial jury because three jurors, while on break outside the building, heard a remark apparently shouted by a county maintenance employee. The trial court carefully interrogated the three jurors and determined that two of them heard the word "guilty," while the third heard someone say "defense smoking." Each assured the court that the incident did not influence or interfere with his deliberations in this case, and the court thereupon denied defendant's motion for mistrial.

The denial of a motion for mistrial rests in the trial court's sound discretion, and an abuse of discretion will be found only where denial of the motion deprived the defendant of a fair and impartial trial. *People v McAlister*, 203 Mich App 495, 503; 513 NW2d 431 (1994). An abuse of discretion will be found only when an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *People v Watkins*, 176 Mich App 428, 430; 440 NW2d 36 (1989). Under the unusual facts of this case, we cannot say the trial court abused its discretion by denying defendant's motion.

Next, defendant claims that Offense Variable 2, dealing with infliction of bodily injury upon the victim, should have been scored at zero instead of twenty-five points. Appellate courts may not review claims of error based on an alleged misinterpretation of the guidelines. *People v Mitchell*, 454 Mich 145, 176-177; 560 NW2d 600 (1997). "[A]pplication of the guidelines states a cognizable claim on appeal only where (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate." Because the evidence demonstrates that the factual predicates at issue here are neither "wholly unsupported" nor "materially false," defendant has failed to state a cognizable claim. *Id.*

As his final allegation of error, defendant contends that he is entitled to a new trial based on newly discovered evidence. We disagree. In order to merit a new trial on the basis of newly discovered evidence, a defendant must show that the evidence (1) is newly discovered, (2) is not merely cumulative, (3) is likely to change the result, and (4) was not discoverable and producible at trial with reasonable diligence. *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994); *Hauser v Roma's of Michigan, Inc*, 156 Mich App 102, 106; 401 NW2d 630 (1986). Our review of the evidence convinces us that these criteria have not been met, and it is therefore unnecessary to remand this case to the trial court for an evidentiary hearing on this issue or for new trial.

Affirmed.

/s/ Barbara B. MacKenzie  
/s/ William C. Whitbeck  
/s/ Glenn S. Allen, Jr.