

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT JOSEPH MATHIS,

Defendant-Appellant.

UNPUBLISHED

July 24, 1998

No. 190162

Macomb Circuit Court

LC No. 94-002493 FC

Before: Griffin, P.J., and Gribbs and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of two counts of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788. Defendant was sentenced to two concurrent terms of eight to twenty years' imprisonment. We affirm.

Defendant argues on appeal that the trial court erred in denying his motion for a directed verdict. We disagree.

When ruling on a motion for directed verdict, the trial court must consider the evidence presented by the prosecutor up to the time the motion was made in the light most favorable to the prosecution and determine whether a rational trier of fact could find the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Warren*, ___ Mich App ___, ___ NW2d ___ (Docket No. 190133, rel'd 2/27/98), slip op at 5. The court may not determine the weight of the evidence or the credibility of witnesses. *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997). When reviewing a trial court's ruling on a motion for directed verdict, this Court tests the validity of the motion by the same standard as the trial court. *Warren, supra*, slip op at 5.

At the time of defendant's directed verdict motion, the prosecutor had submitted sufficient evidence to prove all the essential elements of first-degree criminal sexual conduct beyond a reasonable doubt. The victim testified that defendant and another man pushed her to the floor, held her down, and forcibly penetrated her vagina and mouth. This testimony alone was sufficient to establish defendant's guilt of first-degree criminal sexual conduct beyond a reasonable doubt. Although defendant argues that there was insufficient evidence to prove his guilt because the victim's testimony was not credible, the

trial court was not permitted to weigh the victim's credibility in ruling on defendant's directed verdict motion. *Mehall, supra*.

Defendant also argues that the trial court abused its discretion in denying his motion for new trial based on the great weight of the evidence because it erroneously ruled as a matter of law that it could not consider the complainant's credibility. We disagree.

While a motion for a new trial based on the great weight of the evidence necessarily involves an evaluation of witness credibility, the trial court may not, absent exceptional circumstances, repudiate a jury verdict on the ground that it disbelieves the testimony of the witnesses for the prevailing party. *People v Lemmon*, 456 Mich 625, 636; ___ NW2d ___ (1998).

Even where testimony is in direct conflict and testimony supporting the verdict has been impeached, the issue of credibility is still for the jury unless the trial court determines as a matter of law that the testimony was deprived of all probative value or that no reasonable jury could have believed it. *Id.* at 22.

Here, in ruling on defendant's new trial motion, the trial court stated that the victim's credibility was "a little bit in question." However, this clearly did not constitute a finding as a matter of law that her testimony was "deprived of all probative value" or that no reasonable jury could have believed it. Indeed, the trial court stated that there was "no question" that the victim had been sexually assaulted. Moreover, the trial court clearly determined that the great weight of the evidence was against defendant. There is no further indication that an innocent person has been convicted, or that refusal to disturb the verdict will result in manifest injustice.

Defendant argues that the trial court abused its discretion in excluding exculpatory evidence on erroneous grounds. We review a trial court's decision to exclude evidence for an abuse of discretion. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

Defendant first argues that the trial court abused its discretion by refusing to allow the defense access to the victim's psychological records because it prevented the defense from challenging testimony that the victim suffered psychological injury as a result of her assault. This argument is without merit. Prior to trial, the trial court granted defendant's motion for an in-camera review of the victim's psychological records from Cottage Hospital, in accordance with the procedure set forth in *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994). The trial court concluded that the privileged records did not contain information essential and reasonably necessary for the defense, and thus, refused to release the records to defendant. Defendant now argues that the records were necessary for the purpose of impeaching the credibility of the victim and her mother. However, the victim's psychological records "are not intended to be available as evidence, *either for impeachment or as exculpatory evidence*, in a civil or criminal trial." *Id.* at 662 (emphasis added). Accordingly, we conclude that the trial court did not abuse its discretion in refusing to disclose the contents of the victim's psychological records, even for the limited purpose of impeachment.

Next, defendant argues that the trial court abused its discretion in refusing to allow him the opportunity to cross-examine the victim about psychological counseling she received prior to the date of the sexual assault. We disagree. Defendant is unable to articulate a cogent theory of relevance in regard to this evidence beyond the assertion that this evidence could have revealed that the victim's post-assault treatment at Cottage Hospital may have been related to a pre-existing psychological malady. However, because the trial court conducted an in-camera review of the victim's treatment records from Cottage Hospital, defense counsel was well-aware that the victim's treatment at Cottage Hospital was primarily for bronchitis. Where necessary, the trial court has the responsibility to restrict the scope of cross-examination to prevent questions that would harass, annoy, or humiliate the victim and to guard against "fishing expeditions." *People v Williams*, 191 Mich App 269, 273; 477 NW2d 877 (1991). Therefore, we conclude that the trial court did not abuse its discretion in refusing to permit defense counsel to engage in this line of questioning.

Next, defendant argues that he should have been allowed to introduce a doctor's opinion as to whether or not the complainant's injuries were consistent with her version of the offense. We disagree. Michigan law clearly prohibits a doctor from testifying as to his opinion of the victim's truthfulness or veracity. *People v Smith*, 425 Mich 98, 113; 387 NW2d 814 (1986).

We further conclude that the trial court did not abuse its discretion in refusing to permit defendant to introduce two photographs of houses on the street where the victim was assaulted, which was part of defendant's attempt to prove that the victim had wrongfully identified him. To lay a proper foundation for the admission of a photograph, a person familiar with the scene depicted in the picture must testify on the basis of personal observation that the photograph is an accurate representation of the scene at the time in question. *People v Cyr*, 113 Mich App 213, 225; 317 NW2d 857 (1982). In the present case, the private investigator took the photographs a year after the incident occurred and could not testify as to whether the photographs accurately depicted the scene at the time of the offense. Accordingly, the trial court did not abuse its discretion by excluding these photographs for lack of proper foundation testimony.

Lastly, we disagree with defendant's argument that the trial court abused its discretion by refusing defendant's attempt to introduce a police officer's report that included the victim's statements concerning the crime. Although defendant sought to introduce this report as extrinsic evidence of the victim's prior consistent statements, evidence is admissible for this purpose where a witness denies recollection of a prior inconsistent statement. *People v Malone*, 180 Mich App 347, 359; 447 NW2d 157 (1989). The victim had not denied making prior inconsistent statements when defendant sought to introduce this evidence. Moreover, the record clearly shows that after the victim testified, the police officer who prepared the report was re-called by the defense and defense counsel was allowed wide latitude in questioning him as to the contents of the report. Although the actual report was not admitted into evidence, defense counsel was clearly able to use the police officer's testimony to illustrate its theory of defense that the victim changed her story after talking to defendant's next door neighbor. Accordingly, we do not believe that defendant has established an abuse of discretion in regard to this evidence.

Defendant contends that the trial court abused its discretion by admitting a detective's opinion testimony, arguing that the prosecutor failed to lay a proper foundation to qualify him as an expert on the subject of his opinion. We disagree.

On direct examination, the prosecutor asked Detective Daniel Novak if he had an opinion as to whether trauma can affect a person's ability to relate the details of the trauma soon after the event. Defense counsel objected and the trial court instructed the prosecutor to lay a foundation as to any expertise regarding trauma victims. Detective Novak then revealed that he had interviewed several hundred trauma victims during the course of his career, that he had received training for interviewing rape victims, and that he had spoken at length with other police officers regarding trauma victims and their ability to relate details of their trauma. The trial court subsequently admitted Novak's testimony on the subject of trauma victims and their experiences.

A witness may be qualified as an expert by knowledge, skill, experience, training or education. MRE 702; *People v Haywood*, 209 Mich App 217, 224-225; 530 NW2d 497 (1995). By virtue of his extensive experience, knowledge and training, Detective Novak was clearly qualified to testify as an expert on the subject of trauma victims and their ability to relate the details of their experience. Therefore, the trial court did not abuse its discretion by allowing Novak to testify as an expert witness.

Defendant also argues that the trial court abused its discretion by denying his new trial motion based on newly discovered evidence that the victim committed perjury at defendant's trial. We disagree.

Defendant contends that the victim previously filed false reports of sexual assault and that defense counsel did not discover these reports and their contents until after trial. However, there is no proof that these reports actually were false. The discovery that testimony introduced at trial was perjury may be grounds for a new trial. *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994). However, at most, this evidence merely constituted additional impeachment evidence. Newly discovered evidence is not grounds for a new trial where it would be used merely for impeachment purposes. *People v Davis*, 199 Mich App 502, 516; 503 NW2d 457 (1993). Accordingly, the trial court did not abuse its discretion by refusing to grant a new trial for discovery of new evidence.

Additionally, we disagree with defendant's argument that his attorney's failure to make a specific discovery request for previous police reports filed by the victim amounted to ineffective assistance of counsel. Effective assistance of counsel is strongly presumed, and the burden of overcoming this presumption rests with the defendant. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). The defendant must show that (1) counsel's performance was objectively unreasonable, and (2) that the defendant was prejudiced by counsel's defective performance. *Id.* Counsel's performance is objectively unreasonable if counsel has made errors so serious that counsel was not functioning as counsel. *Id.* A defendant is prejudiced by counsel's defective performance if it is so prejudicial as to deny the defendant a fair trial; that is, there is a reasonable probability that but for the defective performance, the results of the proceedings would have been different. *Id.* at 158.

Here, defense counsel's motion for additional discovery requested all statements taken from witnesses during the course of the investigation as well as the criminal records of all witnesses listed, including the victim. The prosecutor responded by stating that defendant had received every police report and witness statement generated in the case and that the prosecutor would submit the requested criminal records. There was no indication that a more specific discovery request was required. Additionally, the prosecutor affirmatively stated that there were no false claims of rape prior to the current offense. Under the circumstances, we can find no basis upon which to say that defense counsel's performance was objectively deficient. Accordingly, we do not agree that defendant received ineffective assistance of counsel.

Defendant argues that he was denied a fair and impartial trial on the basis of prosecutorial misconduct. We disagree.

We review questions of prosecutorial misconduct on a case-by-case basis. The challenged remarks are considered in context and evaluated in light of arguments by defense counsel and their relationship to the evidence presented at trial. *People v Phillips*, 217 Mich App 489, 497; 552 NW2d 487 (1996). The test is whether defendant was denied a fair and impartial trial. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996).

Defendant first argues that the prosecutor committed misconduct by violating his duty to turn over exculpatory evidence, the victim's prior reports to police in other matters, to defense counsel prior to trial. This argument is meritless. The prosecutor is required to provide any *known* exculpatory information or evidence to the defense. MCR 6.201(B); *People v Tracey*, 221 Mich App 321, 323; 561 NW2d 133 (1997). Here, there is no indication that the prosecutor was aware of the unrelated police reports at the time of trial and nonetheless refused to disclose them, or otherwise acted in bad faith.

Defendant also argues that the cumulative effect of the prosecutor's comments during closing arguments deprived him a fair and impartial trial. We do not agree.

First, the prosecutor did not improperly shift the burden of proof to defendant when he commented on the fact that defendant could have called corroborating witnesses, yet chose not to. The prosecutor may argue that the defendant's theory is not credible because, if it were, the defendant would have made more of an effort to present proof, including witnesses, to corroborate his or her defense. *People v Fields*, 450 Mich 94, 117-118; 538 NW2d 356 (1995).

Second, the prosecutor did not improperly vouch for the credibility of the victim by stating that she had been "able to convince her mom, Michelle, the nurse, the physician, and Officer Nelson that she was raped." The prosecutor may comment on the credibility of witnesses when there is conflicting testimony. *People v Flanigan*, 129 Mich App 786; 342 NW2d 609 (1983). In this case, the clear defense at trial was that the victim was not raped. Therefore, we conclude that the prosecutor properly commented on the fact that other evidence presented at trial supported the credibility of the victim's testimony that she was raped, and that she was not "acting" or inventing it.

Third, we disagree with defendant's argument that he was prejudiced by the prosecutor's improper appeal to juror sympathy. The challenged remark was made in the context of asking the jurors what other motivation that complainant would have had for going to the emergency room for an examination on the night of the attack. It did not amount to an appeal for sympathy.

Fourth, the prosecutor also asked the jurors to evaluate the reasonableness of defendant's behavior when he was accused of the crime and consider whether they would have reacted calmly, as defendant did, or whether they would have been outraged by the accusation. This is not improper argument. The prosecutor may comment on the evidence and argue that a witness is not worthy of belief, even to the point of contending that the defendant is lying. *People v Thomas*, 126 Mich App 611, 624-625; 337 NW2d 598 (1983).

Accordingly, we conclude that defendant failed to establish the existence of prosecutorial misconduct.

Next, defendant argues that the trial court erred in failing to give the jury a separate instruction on aiding and abetting, because he was charged with two counts of first-degree criminal sexual conduct, but only directly engaged in one act of penetration. Defendant failed to object on this basis to the trial court's instructions. Because we find that the instruction as a whole sufficiently presented the issues to be tried, we find that our refusal to address this issue will not result in manifest injustice. See *People v Yarger*, 193 Mich App 532, 536; 485 NW2d 119 (1992).

Defendant also argues that he was entitled to an instruction stating that the jury must reach a unanimous decision as to which specific sexual act defendant was guilty of performing on the victim. Here, there were two assailants and two acts of penetration. The jury found defendant guilty of both acts of penetration, both directly and on an aiding and abetting theory. The jury clearly found defendant responsible for both acts of penetration. Therefore, reversal is not warranted.

Finally, defendant argues that the trial court abused its discretion by scoring fifteen points for Offense Variable (OV) 5, for moving the victim to a place or situation of greater danger, and scoring five points for OV 13, for serious psychological injury to the victim that necessitated professional treatment. Appellate relief is not available for claims of error based on alleged misinterpretation or misapplication of the scoring guidelines. *Mitchell, supra* at 176.

Affirmed.

/s/ Richard Allen Griffin

/s/ Roman S. Gibbs

/s/ Michael J. Talbot