

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEO EDWARD NIEZGODA,

Defendant-Appellant.

UNPUBLISHED

January 29, 1999

No. 202495

Montcalm Circuit Court

LC No. 96-000263 FH

Before: Hood, P.J. and Neff and Markey, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of third-degree criminal sexual conduct, MCL 750.520d(1)(a); MSA 28.788(4)(1)(a), for sexually penetrating a thirteen year old female. He was subsequently sentenced as second habitual offender, MCL 769.10; MSA 28.1282, to an enhanced term of twelve to twenty-two and one-half years in prison, and appeals as of right. We affirm.

Defendant's sole argument on appeal is that the trial court deprived him of his due process rights and abused its discretion by allowing the testimony of an expert witness named four days prior to trial. MCL 767.40a(3); MSA 28.980(1)(3) provides that the prosecuting attorney shall furnish a witness list to a defendant not less than thirty days before trial. The statute further provides that the prosecution may add or delete from the list of witnesses at any time upon leave of the court and for good cause shown or by stipulation of the parties. MCL 767.40a(4); MSA 28.980(1)(4); *People v Burwick*, 450 Mich 281, 290; 537 NW2d 813 (1995). Four days before defendant's trial, the prosecution advised defense counsel that it was substituting a physician's assistant as a witness in place of a doctor whose name was included on the witness list. When defendant objected, the prosecutor explained that shortly before trial she discovered that the physician assistant, not the doctor, had actually done the physical examination of the victim. The court made no specific finding of good cause for adding this witness. Because the prosecution in this case did not discover who had actually examined the victim until four days before trial, however, good cause was established, and it does not appear that defendant was disadvantaged.

Defendant's claim of prejudice -- his inability to investigate the physician's assistant to find impeachable information -- is a red herring in light of her actual testimony. She was unable to say that

the victim was sexually assaulted. Therefore, it does not appear that defendant had any reason to impeach her.

Defendant has also failed to establish that the court's ruling resulted in a miscarriage of justice, as required by MCL 769.26; MSA 28.1096. It provides that no verdict shall be reversed or a new trial be granted on the grounds of an improper admission of evidence unless the error complained of has resulted in a miscarriage of justice. The Michigan Supreme Court recently held that evidentiary errors result in a miscarriage of justice if it is highly probable that the challenged evidence contributed to the verdict. *People v Gearns*, 457 Mich 170, 205; 577 NW2d 422 (1998). In the instant case, the victim testified that she was assaulted against her will by defendant. Her testimony was corroborated by another witness who testified that he was in the room while defendant sexually penetrated the victim. In comparison to the eyewitness testimony, the physician's assistant's testimony that she examined the victim and could not make a determination with regard to whether the victim was sexually assaulted cannot be said to have had a highly probable contribution to the verdict of guilty.

Defendant also alleges that the court's ruling violated his due process rights. Defendant does not clearly define how the court's ruling impeded his due process, but the argument seems to center on the defense's inability to investigate the background of the physician's assistant in order to discover issues upon which she could be impeached. Defendant neither requested nor did the court order sua sponte a continuance to allow defense counsel to prepare. However because, as indicated earlier, this witness was not helpful to the prosecution, defendant's case would not have been significantly served by an opportunity to investigate grounds for impeachment.

Affirmed.

/s/ Harold Hood

/s/ Janet T. Neff

/s/ Jane E. Markey