STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES ANTHONY WHITE,

Defendant-Appellant.

UNPUBLISHED
February 26, 1999

No. 200498
Saginaw Circuit Court
LC No. 96-012263 FC

Before: Saad, P.J., and Kelly and Bandstra, JJ.

PER CURIAM.

A jury convicted defendant of three counts of first-degree criminal sexual conduct ("CSC").[1] The trial court subsequently adjudicated defendant as a second habitual offender[2] and sentenced him to life imprisonment. Following a remand for resentencing, the trial court resentenced defendant to a term of eleven to thirty years' imprisonment.[3] Defendant appeals his CSC conviction, and we affirm.

I

Defendant claims that the trial court failed to take appropriate action in response to the prosecutor's alleged violation of discovery rules.[4] Defendant argues that the trial court should not have allowed Kyle Hoskins' testimony and that the court should have declared a mistrial because defendant did not timely receive parts of Nurse Kress' notes. We disagree.

A "defendant is entitled to have produced at trial all the evidence bearing on his guilt or innocence which is within the control of the prosecutor, including prior statements of witnesses which may be used for impeachment." *People v Florinchi*, 84 Mich App 128, 133; 269 NW2d 500 (1978). Additionally, although neither party seems to rely upon it, MCR 6.201(A) (effective January 1, 1995, prior to this trial) requires in a criminal case that each party, upon request, provide to the other parties the names and addresses of all trial witnesses, written or recorded lay witness statements, and reports prepared by expert witnesses to be called at trial.

If a party fails to comply with discovery rules, the trial court has the discretion to order that testimony or evidence be excluded, or to fashion another remedy. MCR 6.201(J). We review a trial

court's decision regarding the appropriate remedy for a discovery violation for an abuse of discretion. *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997) (discovery order); *People v Taylor*, 159 Mich App 468, 476; 406 NW2d 859 (1987) (discovery agreement). When exercising its discretion, the trial court should balance "the interests of the courts, the public, and the parties." *Davie*, 598. Such an inquiry should focus on "all the relevant circumstances, including 'the causes and bona fides of tardy, or total, noncompliance, and a showing by the objecting party of actual prejudice.'" *Id*., quoting *Taylor*, 487; see also *People v Fox*, __ Mich App __; __ NW2d __ (Docket No. 198890, rel'd 11/20/98) (1998). Here, we find no abuse of discretion.

A

Defendant contends that the trial court should have stricken the testimony of Kyle Hoskins of the Michigan State Police Crime Laboratory because the prosecutor violated discovery requirements by failing to endorse Hoskins as an expert, and by failing to give defendant "any of her reports." Under the circumstances, it was not an abuse of discretion to permit Hoskins to testify. The people's witness list includes the entry "REP MSP LAB," next to which an unknown author has handwritten "Tani Watkins" and the name Hoskins appears parenthetically. Regarding Hoskins' reports, the record indicates that defendant received some reports, but apparently not Hoskins' last report. Moreover, the record indicates that the trial court overruled defendant's objection to Hoskins' late endorsement because it believed that all reports had been furnished.

Given these facts, we cannot say that the trial court abused its discretion in permitting Hoskins to testify because defendant has not established that he was prejudiced. Defendant asserts that he was prejudiced by not being able to prepare for the testimony but does not explain how preparation would have made a difference. Both defendant and Pulliam admitted to having sexual intercourse with complainant. Instead, the parties disputed whether it was consensual and whether both males had anal intercourse with complainant. Hoskins merely testified that she could not include defendant as a contributor on the vaginal swabs taken from complainant, and that no seminal fluid was found on the rectal or oral swabs taken from complainant. Although defendant's seminal fluid may have been linked to a blanket, flat sheet, and fitted sheet taken from defendant's apartment, this testimony was not prejudicial because they were his sheets off his own bed, and defendant admitted that sexual intercourse occurred.

Moreover, defendant received notice of the correct name of the MSP lab witness during opening statement, but did not voice an objection at that time. Furthermore, defendant did not seek a continuance when the trial was underway. Suppression of evidence as remedy for a discovery violation is disfavored where another remedy, such as continuance, could have protected the defendant's interest. See *People v Clark*, 164 Mich App 224, 230; 416 NW2d 390 (1987). Finally, the prosecutor's failure to expressly endorse Hoskins and provide the final report appears to have been inadvertent.

B

Defendant further argues that the trial court should have declared a mistrial because the prosecutor violated discovery rules by failing to provide certain reports from Nurse Kress until the middle of trial, after the victim had testified. Defendant moved for a mistrial at the time, but the court ultimately deferred the motion until later, after the jury convicted defendant. During that hearing, the detective testified that after the jury was seated, but before the trial began, she discovered that the prosecutor and defendant did not have the notes. Apparently, an error in the copying process caused the unintentional omission of some of the notes. The parties disputed at what point in the trial defendant received the notes. The detective claimed that she gave copies to defendant before the victim, who was the first witness, testified. Defense counsel averred that he did not receive the notes until after both complainant and Kress testified. The trial court denied defendant's motion in a written order, finding that the notes were not delivered before the nurse's testimony and noting that the prosecutor did not use the notes until defendant used them during the nurse's cross-examination. The trial court attached an excerpt of the trial transcript, which indicated that defendant questioned Kress about prior allegations of rape that were contained in the notes.

The trial court did not abuse its discretion because the detective's failure to provide the notes before complainant's testimony did not deprive defendant of a fair trial. Defendant has failed to show that he was prejudiced by the delay in receiving the notes. Defendant argues that he "had no reason to carefully interview [Nurse Kress] before trial because her other report, provided in discovery, said little". Defendant alleges that the notes revealed that complainant told Kress about an alleged death threat and that complainant told Kress about a previous rape. Defendant claims that the lack of prior information on these aspects of the Kress notes prejudiced him. We disagree.

Although defendant argues that he could have investigated the prior rape claim to determine if it was a false accusation, he has not shown this Court that the prior allegations were false. CSC defendants should be permitted to show that a complainant has previously made a false accusation of rape. *People v Hackett*, 421 Mich 338, 348; 365 NW2d 120 (1984). However, the defendant "is obligated initially to make an offer of proof as to the proposed evidence and to demonstrate its relevance to the purpose for which it is sought to be admitted." *Id.*, 350. When a defendant attempts to make this offer of proof, the trial court has the responsibility "to guard against mere fishing expeditions." *Id.*, 350-351. Here, the possibility that defendant could have made an offer of proof that the allegation was false is purely speculative.

With respect to the alleged death threat, there is no merit to defendant's claim that this is significantly different from complainant's testimony that defendant merely threatened to "hurt" her. It is improbable that the jury would have paid much attention to the distinction between defendant's alleged threat to hurt the victim and her family, and his alleged death threats; the important allegation was that defendant allegedly tried to intimidate the victim by use of threats. Accordingly, defendant has not established that he was prejudiced by not having the notes prior to the complainant's testimony.

Furthermore, we find no abuse of discretion because defendant did not seek a continuance. *Clark*, 164 Mich App 230. Finally, although a police detective can be considered an agent of the prosecutor, there was no evidence to support defendant's argument that the police officer intentionally

withheld or concealed the information. Moreover, there was no evidence that the prosecutor bore any responsibility for withholding notes from defendant. See *People v Paris*, 166 Mich App 276, 282; 420 NW2d 184 (1988), where a panel of this Court supported the striking of a witness' testimony where the prosecutor's failure to provide the defendant with a transcript, obtained without notice, amounted to a "deliberate intent to prejudice defendant's ability to present a defense."

Defendant's reliance on both *People v Pace*, 102 Mich App 522; 302 NW2d 216 (1980), and *People v Florinchi*, 84 Mich App 128; 269 NW2d 500 (1978), is misplaced in light of the decision in *Taylor*, 159 Mich App 471, where a subsequent panel of this Court held that the procedural problem of not complying with a discovery request or order should not "be elevated to constitutional rank and locked into an inflexible remedy." Here, where the trial court has not abused its discretion in addressing the alleged discovery violations, defendant is not entitled to reversal of his conviction.

II

Defendant contends that he is entitled to a new trial because the trial court improperly allowed the prosecutor to present rebuttal testimony on a collateral point by calling Vernon Mall, Jr. This issue has not been preserved. Defendant withdrew his objection to the prosecutor's use of rebuttal witness Mall during the course of the trial. Furthermore, there is no merit to this issue. "Rebuttal evidence is admissible to 'contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same.'" *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996) [quoting *People v DeLano*, 318 Mich 557, 570; 28 NW2d 909 (1947)]. "[T]he test of whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecutor's case in chief, but, rather, whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant." *Figgures*, 399. However, the prosecution cannot introduce rebuttal evidence "unless it relates to a substantive rather than a collateral matter." *People v Humphreys*, 221 Mich App 443, 446-447; 561 NW2d 868 (1997). The prosecutor appropriately called Mall to impugn Pulliam's credibility after Pulliam testified on defendant's behalf. Mall's testimony was thus responsive to Pulliam's testimony regarding complainant's and Pulliam's conduct during the taxi cab ride to complainant's home.

Furthermore, were this testimony improper, the error would be harmless. Defendant complains that Mall maligned Pulliam's character by describing him as an undesirable customer. However, defendant, not Pulliam, was on trial here, hence any attack on Pulliam's character would not be prejudicial to defendant.

III

Defendant maintains that the prosecution improperly introduced irrelevant evidence that a rifle was present during the assaults. We disagree.

All relevant evidence is generally admissible, while all irrelevant evidence is not. MRE 402. To be relevant, evidence must be material and probative. *People v Brooks*, 453 Mich 511, 517; 557

NW2d 106 (1996). To be material, evidence must relate to a matter in issue. *Id.*, 518. To be probative, any tendency that the existence of an important fact would be found more or less probable is sufficient. MRE 401; *People v Mills*, 450 Mich 61, 68; 537 NW2d 909 (1995). However, an error in the admission of evidence is considered harmless if "it has had no effect on the verdict." *People v Minor*, 213 Mich App 682, 685; 541 NW2d 576 (1995). Error may not be predicated upon a ruling which admits evidence unless a substantial right of the party is affected and the party makes a timely objection. MRE 103(A)(1); MCR 2.613(A).

Here, there was no error in the admission of the evidence. Although complainant reported to the police that the rifle had nothing to do with the sexual assaults, she also testified that the gun's presence contributed to her fear during the assault. The rifle was, therefore, tangentially related to the issue of force and coercion, although the CSC charges were not based on use of a firearm, and there was no allegation that defendant used the gun to accomplish the assault. Furthermore, if this evidence could be deemed irrelevant, the error would be harmless. The complainant herself minimized the importance of this evidence by testifying that the firearm had nothing to do with the instant offense. The jury therefore would not have considered this evidence for the wrong purposes or attributed it undue weight. Although the prosecutor made references to the rifle, the court instructed the jury that the attorneys' statements are not evidence. Any alleged error would have been harmless beyond a reasonable doubt, and defendant is not entitled to a new trial. *People v Oswald*, 188 Mich App 1, 8; 469 NW2d 306 (1991); MRE 103(A)(1); MCR 2.613(A).

IV

Defendant claims that he was denied a fair trial because of prosecutorial misconduct. We review preserved claims of prosecutorial misconduct in context to determine whether defendant was denied a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Appellate review of prosecutorial misconduct is generally precluded absent trial counsel's objection "because the trial court is otherwise deprived of an opportunity to cure the error." *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). "An exception exists if a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice." *Id.* A miscarriage of justice does not exist if a curative instruction could have remedied the prejudicial effect. *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996).

A

Defendant claims that the prosecutor improperly made statements in his closing argument which were not based on the evidence. Specifically, defendant complains of remarks that complainant "must remember that night and relive that night every time she remembers it" for the rest of her life. The prosecution "may not argue the effect of testimony" not admitted in evidence. *Stanaway*, 446 Mich 686. However, the appropriateness of a prosecutor's remarks depends "on all the facts of the case," and they are evaluated in light of the relationship or lack of relationship they bear to the evidence admitted at trial." *People v Johnson*, 187 Mich App 621, 625; 468 NW2d 307 (1991).

Based on the context in which this remark was made, we find that it does not constitute prosecutorial misconduct. First, the prosecutor told the jury at the very beginning of his closing argument that what he said was not evidence. Second, the trial court stated in open court that it would be up to the jury to determine if the "statements of Counsel are true or not". Third, the trial court later instructed the jurors that it was their "job to decide what the facts of this case are". Moreover, the court told the jurors that the "statements and arguments" of the lawyers were "not evidence". Such an instruction will cure erroneous arguments, even civic duty arguments, made by a prosecutor during a closing argument. *People v Curry*, 175 Mich App 33, 45; 437 NW2d 310 (1989).

B

Defendant also argues that the prosecutor made an improper "civic duty" argument when he stated that complainant "can't ever get even" and commented that complainant "looks to you as the jury in this case . . . to arrive at justice." Similarly, defendant objects to remarks that complainant was "enslaved" for defendant's own pleasure and deprived of her "freedom, privacy, and dignity." Defendant made no objection to these remarks, hence, this issue is unpreserved. However, we do not believe these remarks constituted a "civic duty" argument. Rather than an appeal to the jury's sympathy or prejudices, the remark about "getting even" can be construed as a comment on the role of the jury in the criminal justice system. We also find nothing objectionable in the prosecutor's remarks that defendant and Pulliam "enslaved" complainant and treated her as an "animal" for their own pleasure. "Prosecutors may use 'hard language' when it is supported by evidence and are not required to phrase arguments in the blandest of all possible terms." *People v Ullah*, 216 Mich App 669, 678, 550 NW2d 568 (1996). Prosecutors also may use emotional language during closing argument. *Id.*, 679. In any event, the trial court's instructions, quoted above, would have served as a curative effect, even if the remarks could be construed as a "civic duty" argument. *Curry, supra*.

C

Defendant further contends that the prosecutor improperly shifted the burden of proof by commenting that defendant failed to show a reason for complainant to lie. He objects to the question the prosecutor posited during closing remarks: "What's been shown that helps her [complainant's] life to say that [the rape] happened if it didn't happen?"

The prosecutor may not challenge the defendant to "prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof." *People v Green*, 131 Mich App 232, 237; 345 NW2d 676 (1983). Additionally, a prosecutor "may not vouch for the character of a witness." *People v Rosales*, 160 Mich App 304, 309; 408 NW2d 140 (1987). Nonetheless, the "mere statement alone of the prosecutor's belief in the honesty of a witness' testimony generally does not constitute error requiring reversal if, as a whole, the remarks are fair." *Id.* Furthermore, a prosecutor may "argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief." *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997).

Defendant's entire argument concerns the one sentence quoted above. We cannot say that the comment, which was not met with any objection, shifted the burden of proof, vouched for complainant's credibility, or amounted to a miscarriage of justice. In context, it was an appeal to the jurors to use their common sense in evaluating the witness' credibility, not a challenge to defendant to establish why she would fabricate charges. Moreover, the prosecutor told the jurors that although defendant presented evidence, it was the prosecutor who had the burden of proof, not defendant.

D

Defendant also argues that although objections were not made to each remark, the cumulative effect of the remarks were incapable of cure by instruction, and defendant's failure to object therefore will not preclude reversal. We disagree. The alleged instances of misconduct here involved either proper argument or remarks that could be and were cured by the trial court's instructions. *Howard*, 226 Mich App 549. "Viewed as a whole, the prosecutor's remarks did not deprive defendant of a fair trial." *Id.* Defendant's reliance on *People v Davis*, 58 Mich App 159, 162; 227 NW2d 269 (1975), is misplaced. In *Davis*, *supra*, the prosecutor made a sham closing and reserved the substance of his argument for rebuttal when the defendant could not respond. *Id.*, 161 n 2. Nothing like this occurred here. Defendant is not entitled to relief for prosecutorial misconduct.

V

Finally, defendant claims ineffective assistance of counsel. Here, defendant failed to move for a new trial or a *Ginther* hearing.[5] Consequently, review is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). A defendant arguing ineffective assistance on the basis of defective performance must show (1) that the performance of counsel "fell below an objective standard of reasonableness"; and (2) that had defense counsel not made the "unprofessional errors . . . the result of the proceeding would have been different." *People v Mitchell*, 454 Mich 145, 158; 560 NW2d 600 (1997). Defendant must overcome the presumption that counsel's assistance was effective. *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998).

Defendant's ineffective assistance claim is predicated on his trial counsel's failure to object to the testimony of the cab driver, Vernon Mall, Jr., and his failure to object to certain of the prosecutor's closing remarks. With respect to the prosecutor's remarks, we have already concluded that the remarks were acceptable or, at most, corrected by a curative instruction. Moreover, a failure to object might be sound trial strategy. In *Ullah*, 216 Mich App 685, a panel of this Court held that "Counsel's failure to object to the alleged instances of prosecutorial misconduct was not ineffective, because none of the challenged remarks deprived defendant of a fair trial and because the lack of an objection may have been trial strategy." Here, none of the comments made by the prosecutor amounted to prosecutorial misconduct, nor did they deprive defendant of a fair trial.

Regarding Vernon Mall's rebuttal testimony, we have already concluded that this testimony was not improper. Accordingly there was no ineffective assistance in failing to object.

Finally, defendant requests that this Court remand his case for a *Ginther* hearing in the event that this Court finds that the record does not substantiate his ineffective assistance claim. Although we have the inherent authority to remand for a *Ginther* hearing, we decline to do so because defendant has not established that such a hearing is appropriate. *People v Ford*, 417 Mich 66, 113; 331 NW2d 878 (1982). Defendant fails to state with specificity what should be done if his request for a remand were granted. MCR 7.212(C)(8). Additionally, defendant cannot merely announce his position and leave it to this Court to discover and rationalize a basis for his claims. *Joerger v Gordon Food, Inc*, 224 Mich App 167, 178; 568 NW2d 365 (1997).

We do not address the issues defendant raises pertaining to his sentence, as these issues are moot.

Affirmed.

/s/ Henry William Saad
/s/ Michael J. Kelly
/s/ Richard A. Bandstra

[1] MCL 750.520b(1)(d); MSA 28.788(2)(1)(d).

[2] MCL 769.10; MSA 28.1082.

[3] After resentencing, defendant filed a new claim of appeal relating to the new sentence, Docket No 208209. This Court dismissed No 208209 because it was redundant to this appeal. Although given the opportunity to do so, defendant has not filed a supplemental brief raising issues relating to his new sentence.

[4] In his brief, defendant frames this issue as violation of a discovery "order". The substance of his argument, however, concerns discovery *rules* rather than a discovery *order*. Accordingly, we treat this issue as concerning discovery rules.

[5] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).