STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRYAN DANIEL LaGROU,

Defendant-Appellant.

UNPUBLISHED
October 22, 1999

No. 207166
Livingston Circuit Court
LC No. 96-009583 FC

Before: Murphy, P.J., and Gage and Wilder, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree criminal sexual conduct, MCL 750.520b(1)(e); MSA 28.788(2)(1)(e) (armed with weapon), and assault with intent to commit criminal sexual conduct, MCL 750.520(g)(1); MSA 28.788(7)(1). The trial court sentenced defendant as a fourth felony habitual offender, MCL 769.12; MSA 28.1084, to concurrent terms of fifty to eighty years' imprisonment for the first-degree CSC conviction and twenty to forty years' imprisonment for the assault conviction. Defendant appeals as of right. We affirm.

Defendant first claims that the trial court violated his due process right to a fair trial by admitting evidence of the specific nature of defendant's prior felony convictions of unarmed robbery, assault with intent to do great bodily harm, carrying a concealed weapon, and prison escape. We disagree.

We review the trial court's decision to admit evidence for an abuse of discretion. *People v Coleman*, 210 Mich App 1, 6; 532 NW2d 885 (1995). During defense counsel's opening statement, counsel informed the jury that defendant is a convicted felon and that he was on parole at the time the instant events occurred. Although a defendant's credibility generally may not be impeached with prior convictions, MRE 609(a), where defendant's criminal status was specifically raised by the defense and injected into the trial, the defense "opened the door" for the prosecutor to inquire into the specific nature of defendant's prior convictions. See *People v Vasher*, 449 Mich 494, 503; 537 NW2d 168 (1995); *People v Johnson*, 409 Mich 552, 558-560; 297 NW2d 115 (1980). Therefore, the trial court did not abuse its discretion in admitting this evidence.

Next, defendant contends that the trial court violated his right to due process by denying his untimely request to endorse character witness Wanda Brockway, defendant's former girlfriend, to testify regarding defendant's nonaggressive nature in sexual situations. We disagree.

The trial court's ruling on a motion for late endorsement of a witness is reviewed for an abuse of discretion. *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813 (1995); *People v Canter*, 197 Mich App 550, 563; 496 NW2d 336 (1992). Defendant was entitled to present evidence regarding his pertinent character traits, and the prosecution was entitled to offer evidence to rebut the same. MRE 404(a)(1). See *People v Lukity*, 460 Mich 484, 498; __NW2d__ (1999). However, pursuant to MCR 6.201(A)(1), defendant was required to disclose the names of all the witnesses he intended to call at trial. Here, defendant timely submitted the requisite list to the prosecution, but did not list Brockway as a witness. Defendant offered no explanation to the trial court or this Court for his failure to identify Brockway as a witness prior to trial; nor has defendant explained why he waited until the second day of trial to submit the late request for endorsement. Furthermore, Brockway's testimony would have been cumulative to that already presented by defense witness Hazel Barnett, see MRE 403, and contrary to defendant's assertion, this was not a pure credibility contest between himself and the victim. There was substantial physical evidence to corroborate the victim's version of the events surrounding the offense, including the torn bedroom screen, the knife wound on her neck, the cut telephone cord, and the red bandanna found in defendant's home. On this record, we find that defendant failed to establish good cause for the late endorsement, and the trial court did not abuse its discretion in denying the request.

Third, defendant claims that the trial court erred in failing to admit his favorable polygraph results at trial. We disagree.

We review the trial court's decision regarding the admissibility of scientific evidence, including polygraph results, for clear error. *People v Barbara*, 400 Mich 352, 364; 255 NW2d 171 (1977); *People v Smith*, 211 Mich App 233; 535 NW2d 248 (1995). The trial court's ruling is consistent with the long-standing rule in Michigan that the results of polygraph examinations are not admissible at trial. *Barbara, supra* at 364; *People v Ray*, 431 Mich 260, 265; 430 NW2d 626 (1988). The Michigan Supreme Court's decision in *Barbara* was based on the *Davis-Frye*[1] rule, under which novel scientific evidence must be shown to have gained general acceptance in the scientific community in order to be admissible at trial. Although defendant now urges this Court to reexamine the viability of this aspect of the Supreme Court's decision in *Barbara* in light of *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993), which replaces the restrictive "general acceptance in the scientific community" standard of *Davis-Frye* with a more relaxed admissibility standard enunciated in *Daubert*, we decline defendant's invitation to do so under these facts.[2] Until our Supreme Court decides otherwise, this Court and the lower courts are bound to follow the decision in *Barbara*, under which polygraph results are inadmissible at trial. See *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993); *People v Bullock*, 440 Mich 15, 27; 485 NW2d 866 (1992). The trial court did not err in refusing to admit the results of defendant's polygraph examination at trial.[3]

Finally, defendant asserts that the 50 to 80 year sentence, as enhanced by his fourth felony offender status, imposed for his first-degree criminal sexual conduct conviction is disproportionately severe. We disagree.

The trial court has broad discretion in imposing a sentence so as to tailor each sentence to the circumstances of the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990). A sentencing court abuses its discretion when it violates the principle of proportionality which requires that a sentence be proportionate to the seriousness of the offense and the offender. *Milbourn, supra* at 635-636; *People v St John*, 230 Mich App 644, 649; 585 NW2d 849 (1998). In this case, the nature of the crime was serious and defendant's extensive criminal history demonstrates that he is unable to conform his conduct to the law. The sentence imposed by the trial court is proportionate to the seriousness of the offense and defendant's prior record, and thus, the trial court did not abuse its discretion. See *People v Hansford (After Remand)*, 454 Mich 320, 323-324, 326; 562 NW2d 460 (1997).

Affirmed.

/s/ William B. Murphy
/s/ Hilda R. Gage
/s/ Kurtis T. Wilder

[1] *People v Davis*, 343 Mich 348; 72 NW2d 269 (1955); *Frye v United States*, 54 US App DC 46; 293 F 1013 (1923).

[2] Contrary to defendant's assertions, this Court has not clearly "abandoned" the *Davis-Frye* standard. While this Court's decision in *Nelson v American Sterilizer Co (On Remand)*, 223 Mich App 485; 566 NW2d 671 (1997), does discuss *Daubert* and incorporates many of its precepts in construing the phrase "recognized scientific knowledge" in MRE 702, this Court did not decide that the *Davis-Frye* test is no longer viable. Moreover, this Court in *Nelson* was not presented with an issue concerning the admissibility of polygraph test results.

[3] We note that the United States Supreme Court has recently acknowledged that there is no consensus in the scientific community that polygraph evidence is reliable, and it held that there is no constitutional right to have polygraph evidence admitted at trial. See *US v Scheffer*, 523 US 303; 118 S Ct 1261; 140 L Ed 2d 413 (1998). As did the Michigan Supreme Court in *Barbara*, the United States Supreme Court expressed its concern that juries would give disproportionate weight to polygraph results and that such evidence could lead jurors to abandon their duty to assess credibility and guilt. *Scheffer, supra* at 303.