

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES HONEYCUTT,

Defendant-Appellant.

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UNPUBLISHED

February 18, 2000

No. 202892

Recorder's Court

LC No. 96-502791

Before: Hood, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of two counts of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), and two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). Defendant was sentenced to a term of 100 to 220 months' imprisonment for each conviction, the sentences to run concurrently. Defendant appeals as of right, and we affirm.

Defendant first argues that the trial court erred in failing to give a preliminary instruction regarding diminished capacity. We disagree. This issue is not preserved because there was no request for such an instruction at the commencement of trial, MCR 6.412(B), or prior to any testimony regarding diminished capacity. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994). Defendant states that the issue of presenting a diminished capacity instruction was raised below, but fails to acknowledge that the discussion involved *final* instructions to be given following closing arguments. Defense counsel did not request that a diminished capacity instruction be given prior to this discussion regarding final instructions. Furthermore, defendant failed to establish any prejudice as a result of this unpreserved, nonconstitutional plain error. *Grant, supra*. Accordingly, defendant's claim of instructional error is without merit.

Defendant next argues that trial counsel was ineffective for failing to object to the prosecution's rebuttal witness, Dr. Firosa Van Horn, failing to object to the scope of her testimony, and failing to request a cautionary instruction regarding the limited use of the testimony. We disagree. Pursuant to MRE 706, a court-appointed expert may be called to testify by the court or any party. Accordingly, the prosecution was entitled to call Dr. Van Horn as a rebuttal witness. Trial counsel was not required

to raise a meritless objection. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997). Furthermore, while MCL 768.20a(5); MSA 28.1043(1)(5) limits the use of defendant's statements at trial, the information elicited from Dr. Van Horn was admissible because it served as the foundation for her opinion. MRE 703; MRE 705; *People v Pickens*, 446 Mich 298, 334-335; 521 NW2d 797 (1994). Additionally, it should be noted that trial counsel used the opportunity to attack the foundation for Dr. Van Horn's opinion based on her acceptance of the victim's version of events and her lack of medical knowledge concerning alcoholic blackouts. Defendant has failed to overcome the presumption that trial counsel's actions were trial strategy. *People v Ho*, 231 Mich App 178, 191; 585 NW2d 357 (1998). Finally, while trial counsel did not request a cautionary instruction regarding Dr. Van Horn's testimony, defendant has failed to demonstrate any resulting prejudice or that the outcome would have been different. *Id.* Accordingly, defendant's contention that trial counsel was ineffective is without merit.

Lastly, defendant argues that the trial court erred in denying his motion for a new trial and a *Ginther*<sup>1</sup> hearing. We disagree. The trial court did not abuse its discretion in denying defendant's motion. *People v Lemmon*, 456 Mich 625, 648 n 27; 576 NW2d 129 (1998).

Affirmed.

/s/ Harold Hood

/s/ Michael R. Smolenski

/s/ Michael J. Talbot

<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).