STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ISRAEL JABRON BRANDON,

Defendant-Appellant.

UNPUBLISHED
March 24, 2000

No. 213914
Washtenaw Circuit Court
LC No. 97-008212 FC

Before: Neff, P.J., and Sawyer and Saad, JJ.

PER CURIAM.

Defendant was convicted of two counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(f); MSA 28.788(2)(1)(f), and one count of assault with intent to commit CSC, MCL 750.520g(1); MSA 28.788(7)(1). Defendant was sentenced to two concurrent terms of twenty to forty years' imprisonment for the first-degree CSC convictions and six to ten years' imprisonment for the assault with intent to commit CSC conviction, to be concurrent with the first-degree CSC terms. Defendant appeals as of right. We affirm.

I

Defendant first argues that the trial court abused its discretion when it denied defendant's motion for a new trial and found that defendant's convictions were not against the great weight of the evidence. We review the trial court's grant or denial of the motion for a new trial for an abuse of discretion. *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999). An abuse of discretion exists when the trial court's denial of the motion is manifestly against the clear weight of the evidence. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

Motions for a new trial that implicate witness credibility are not favored and should be granted only when the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 638-639, 642; 576 NW2d 129 (1998). A trial judge may not grant a new trial on the basis of a disagreement with juror assessment of credibility; that is, a trial judge may not act as a thirteenth juror. *Id*. at 627, 640. Such motions should be granted only in exceptional cases, such as "where the witness' testimony has been

seriously 'impeached' and the case marked by 'uncertainties and discrepancies.'" *Id*. at 642-644, quoting *United States v Martinez*, 763 F2d 1297, 1313 (CA 11, 1985). In addition to finding an "exceptional" instance, the trial court must also have "'a real concern that an innocent person may have been convicted' or that 'it would be a manifest injustice' to allow the guilty verdict to stand." *Lemmon*, *supra* at 644, quoting *United States v Sanchez*, 969 F2d 1409, 1414 (CA 2, 1992). The record shows neither that the victim's testimony was seriously impeached nor that the case was marked with uncertainties and discrepancies.

First, although defendant was able to impeach the victim's testimony by inquiring into her crack cocaine habits and lack of clarity about the night in question, these were peripheral facts. With regard to the actual attack, the victim gave details about how she came in contact with defendant and what specific physical acts defendant engaged in to accomplish the act of penetration. Furthermore, the victim emphatically denied, during cross-examination, that she consented to sexual intercourse. Because defendant's attack on the victim's credibility involved "peripheral" facts about the night in question, attacking such facts can hardly be considered a serious impeachment of the victim.

Second, the case was not marked by uncertainties and discrepancies. Instead, the evidence and other testimony reflected consistency in the case. For example, a bystander testified that he saw the victim run out from behind a building, bleeding and yelling that "Your boy raped me." The record further states that when police officer Coppock arrived at the crime scene, she observed that the victim had blood on her clothes and was bleeding from her face. Furthermore, physical evidence was introduced that established that the body fluids taken from the victim and the crime scene belonged to defendant.

Because no exceptional circumstances existed in this case, the trial court was bound to not disturb the jury's findings. *Lemmon, supra* at 644. Thus, the trial court did not abuse its discretion when it denied defendant's motion for a new trial.

II

Second, defendant argues that the trial court committed error requiring reversal when it failed to read the "addict-informer" instruction sua sponte to the jury. We disagree. In *People v Atkins*, 397 Mich 163, 170; 243 NW2d 292 (1976), our Supreme Court held that special instructions pertaining to addict-informers may be given when the defendant requests such an instruction. *Id*. However, the trial court's failure to instruct on any point of law is not a ground for setting aside a verdict unless the instruction is requested by the defendant. MCL 768.29; MSA 28.1052; see also MCR 2.516(C).

Even if we held that such an instruction should have been given sua sponte, the "addict-informer" instruction would be inapplicable to this case. See, e.g., *People v McKenzie*, 206 Mich App 425, 432; 522 NW2d 661 (1994). CJI2d 5.7 specifically addresses the testimony of addict-informers as opposed to addict-victims. In *People v Hill*, 44 Mich App 308; 205 NW2d 267 (1973), overruled on other grounds in *People v Mayberry*, 52 Mich App 450; 217 NW2d 420 (1974), we noted that there is a distinction between victim eyewitnesses and informers. *Id*. at 315, n 3, citing *United States v Bell*, 457 F2d 1231, 1238-1239 (CA 5, 1972).

> Many informants are intimately involved with the persons informed upon and with the illegal conduct at hand, and this circumstance could also affect their credibility. None of these considerations is present in the eyewitness situation such as was present here. Such observers are seldom involved with the miscreants or the crime. Eyewitnesses by definition are not passing along idle rumor, for they either have been the victim of the crime or have otherwise seen some portion of it. [*Id*.]

In the case at bar, the "addicted" person was the victim of defendant's crime. There was no evidence showing that the victim was intimately involved with defendant or defendant's illegal conduct. Instead, the "addicted" person was the object of defendant's crime and simply notified the police about her victim status.

III

Last, defendant argues that he was denied effective assistance of counsel because his trial counsel failed to call an expert witness for trial, present evidence of possible perjured information and advised defendant to commit perjury. To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) that defendant was prejudiced by counsel's defective performance. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994); *People v Mitchell*, 454 Mich 145, 164; 560 NW2d 600 (1997). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Stanaway, supra* at 687.

First, defense counsel's failure to call an expert witness or present evidence of possible perjured information was a matter of trial strategy. As a general rule, we will not substitute our judgment for that of counsel regarding matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Decisions about what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and failure to call a witness or present evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999); *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). A substantial defense is one that might have affected the outcome of the trial. *Id*. Defense counsel's failure to call an expert witness or present evidence concerning possible perjured information did not deprive defendant of a substantial defense. The record shows that defendant's defense was that he had consensual sexual intercourse with the victim. This defense was articulated in defense counsel's opening statement and closing argument as well as by defendant himself when he testified.

With regard to defense counsel's alleged advice to commit perjury, defendant has not overcome the presumption of effective assistance of counsel. Although defendant attached affidavits to his brief in support of his motion for a new trial, such statements constitute pure conjecture. *Mitchell, supra* at 169. To adequately assess the affidavits, defendant's trial attorney would need to be a necessary witness in determining whether defendant was prejudiced. *Id*. at 168-169. Thus, this Court is relegated to reviewing the record absent the affidavits.

The record, absent the affidavits, shows that before he testified, defendant swore that his testimony would be truthful. Second, when confronted with questions about the note, defendant unequivocally admitted writing the note and stated that he wrote the note because he was concerned about getting a lengthy prison sentence. Furthermore, even if defendant denied writing the note, the outcome of the trial would not have been different because of the other testimony and evidence admitted in the case, all of which support the verdict.

Affirmed.

/s/ Janet T. Neff
/s/ David H. Sawyer
/s/ Henry William Saad