STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 28, 2000
v	No. 210709 Wayne Circuit Court
MICHAEL WIMBUSH, Defendant-Appellant.	LC No. 96-009540

Before: Cavanagh, P.J., and White and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of five counts of first-degree criminal sexual conduct (CSC), MCL 750.520b; MSA 28.788(2), one count of armed robbery, MCL 750.529; MSA 28.797, and one count of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279. The trial court sentenced defendant to twenty to forty years' imprisonment for each of the first-degree CSC convictions, ten to twenty years' imprisonment for the armed robbery conviction, and 6-2/3 to 10 years' imprisonment for the assault with intent to do great bodily harm less than murder conviction, all sentences to be served concurrently. Defendant appeals as of right. We affirm.

I

Defendant asserts that his conviction should be reversed because of errors in the trial court's instructions to the jury. Because defendant failed to raise these allegations of error below, they are not preserved for appellate review. As discussed more fully below, we find that relief is not warranted because defendant has not shown plain error affecting his substantial rights. See *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

First, defendant argues that the trial court should have sua sponte given an instruction on alibi. However, a trial court's failure to give an unrequested alibi instruction is not grounds for reversal if the court properly instructed on the elements of the charged offenses and the requirement that the prosecution prove each element beyond a reasonable doubt. *People v Duff*, 165 Mich App 530, 541-542; 419 NW2d 600 (1987).

Defendant also contends that the trial court's instruction on consent was "erroneous and confusing." We disagree. While the evidence conflicted as to both the circumstances of defendant's encounter with the complainant and the amount of time they were together, the consent instruction was consistent with defendant's defense. Considering the instructions in their entirety, the trial court fairly presented defendant's theory that the prosecution did not meet its burden of proof because the complainant lied. See *People v Whitney*, 228 Mich App 230, 252; 578 NW2d 329 (1998). Furthermore, the trial court did not shift the burden of proof by instructing the jury that it must acquit defendant if it found that the evidence raised a reasonable doubt regarding whether the complainant consented to the sexual acts. See *People v Ullah*, 216 Mich App 669, 677-678; 550 NW2d 568 (1996).

Defendant further complains because the trial court did not re-instruct on the alibi defense, the presumption of innocence, and the burden of proof in its supplemental instruction. However, the trial court did not abuse its discretion in failing to repeat its instructions on these topics, as the jury's specific question pertained to another subject. See *People v Parker*, 230 Mich App 677, 681; 584 NW2d 753 (1998).

II

Defendant's claim that the prosecution improperly impeached its own trial witness, Jeffrey Mitchener, is not properly before us because defendant has not cited the particular testimony elicited by the prosecution that he claims constituted improper impeachment. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). In any event, pursuant to MRE 607, the prosecutor may impeach her own witness.[1] See *People v Kilbourn*, 454 Mich 677, 682; 563 NW2d 669 (1997).

III

Next, defendant asserts that the trial court deprived him of a fair trial by its remarks during defense counsel's cross-examination of the complainant. However, defendant's conjecture that the court's "tone of voice implied criticism of counsel" is entirely speculative. From our review of the transcript, it appears unlikely that the jury viewed the court's remarks as indicating partiality. See *People v Hampton*, 237 Mich App 143, 155-156; 603 NW2d 270 (1999). Indeed, the jury could not have been left with the impression that the trial court considered defense counsel's cross-examination to be grossly improper, as the court ultimately allowed counsel to continue his line of questioning.

IV

Defendant contends that defense counsel's failure to bring the above issues to the attention of the trial court constituted ineffective assistance of counsel. However, we have already reviewed these issues and found no error. Thus, defendant has not met his burden of showing both deficient performance by counsel and resulting prejudice. See *People v Plummer*, 229 Mich App 293, 307-

308; 581 NW2d 753 (1998). Defense counsel was not required to raise frivolous issues or meritless objections. See *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

V

Additionally, defendant claims that the evidence was insufficient to support the armed robbery conviction. When ascertaining whether sufficient evidence was presented at trial to support a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of a crime. *Carines*, *supra* at 757.

The elements of armed robbery are (1) an assault, (2) a felonious taking of property from the complainant's person or presence, and (3) the defendant must be armed with a weapon described in the statute. *People v Newcomb*, 190 Mich App 424, 430; 476 NW2d 749 (1991). An assault can be made out by evidence of an attempt to commit a battery or an unlawful act placing another in reasonable apprehension of receiving an immediate battery. *People v Reeves*, 458 Mich 236, 240; 580 NW2d 433 (1998). Michigan has adopted a transactional approach for analyzing robbery, under which the taking is not considered complete until the assailant has accomplished his escape. *Newcomb*, *supra* at 430-431.

The complainant testified that the initial taking of her property (i.e., her clothing and money) occurred when she complied with defendant's demand, made with knife in hand, that she remove her clothes. In other words, the complainant's reasonable apprehension of receiving an immediate battery was used by defendant to accomplish the taking. The taking was completed when defendant allowed the complainant to put on some of her clothes and leave, but retained the rest of the clothes and her money. Viewing this evidence in a light most favorable to the prosecution, a rational trier of fact could find that the essential elements of armed robbery were proven beyond a reasonable doubt. See *Carines*, *supra*; *Newcomb*, *supra*.

VI

Defendant maintains that the prosecutor violated a discovery order by not providing the complainant's criminal history until the first day of trial. However, the record does not contain a discovery order requiring the prosecutor to furnish the complainant's arrest record, and defendant did not complain below that the prosecutor violated such a discovery order or unreasonably delayed complying with the defense request for the information. Under these facts, we find no plain error upon which relief can be granted. See *Carines*, *supra* at 763.

VII

Finally, defendant argues that the trial court improperly prevented his attorney from impeaching the complainant with her 1992 arrest for solicitation. Defendant claims that the rape shield statute, MCL 750.520j(1); MSA 28.788(10)(1), is not applicable because the evidence would not have been

used to attack the complainant's character, but rather to illustrate the complainant's motive for accusing defendant of the charged offenses and to bolster defendant's version of their encounter.

We first observe that the record does not support defendant's assertion that the evidence was excluded by the court. The prosecutor brought a motion in limine to preclude defense counsel from going into the matter. Defense counsel responded that he was not prepared to argue the issue since he had just received the criminal history record. The matter was concluded with the understanding that if defense counsel intended to question the complainant regarding the subject during trial, he would notify the court. A further colloquy clarified that defense counsel would not be permitted to attempt to raise the issue while the witness was on the stand. The record does not reflect that defense counsel later sought to introduce the evidence at trial.

In any event, we are satisfied that defendant presented his defense through his own testimony that the complainant exchanged sex for drugs, the complainant's testimony that she used cocaine, defendant's statement to police regarding the incident, and the testimony of Mitchener regarding defendant's whereabouts. Even if we were to assume that the evidence was offered, and that the court excluded it and that such exclusion was in error, we would find such error harmless because it is doubtful that the admission of the evidence would have affected the jury's verdict, especially in light of the complainant's injuries.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Helene N. White
/s/ Michael J. Talbot

[1] The cases cited by defendant were decided before the amendment of MRE 607, effective March 1, 1991, which eliminated the restrictions on a party impeaching its own witness.