STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PERRY LEE BRICE,

Defendant-Appellant.

UNPUBLISHED
June 16, 2000

No. 217762
Eaton Circuit Court
LC No. 98-020254-FH

Before: Meter, P.J., and Griffin and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of third-degree criminal sexual conduct, MCL 750.520d(1)(b); MSA 28.788(4)(1)(b). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12; MSA 28.1084, to twenty-five to fifty years' incarceration. Defendant appeals by right and we affirm.

Defendant argues the trial court abused its discretion in denying defendant's motion to exclude the playing of a 911 tape to the jury. We disagree. The decision whether to admit or exclude evidence is within the trial court's sound discretion and will not be disturbed absent an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would conclude there is no justification or excuse for the ruling made. *Id.*

Defendant argues the trial court abused its discretion by allowing the tape recording into evidence because the prejudicial impact of the 911 tape outweighed any probative value. Several cases have discussed the admissibility of 911 tapes. In *People v Parker*, 76 Mich App 432, 445; 257 NW2d 109 (1977), a tape of a victim's 911 telephone call to the police was admitted into evidence. This Court stated the tape had probative value to show the victim's fearful state of mind before he was killed and to rebut any claim of self defense. *Id*. at 444. In *People v Siler*, 171 Mich App 246, 252-253; 429 NW2d 865 (1988), this Court held the victim's statement on a 911 tape indicating that the defendant had stabbed him was extremely probative because no one saw the stabbing, and although it was prejudicial, it was not unfairly prejudicial. In this case, as in *Siler*, the tape was extremely probative

in light of the absence of other witnesses to the assault. In *People v Slaton*, 135 Mich App 328, 334; 354 NW2d 326 (1984), the 911 call included portions of a tape where the victim called out for help and asked not to be hurt followed by moaning sounds. This Court held the tape was properly admitted. This Court noted the sounds were likely to elicit an emotional response from the jury, but stated the effect was not so prejudicial as to require exclusion. *Id*. Similarly, the tape in this case, in which the victim is heard having an asthma attack, may have elicited emotional response. Having listened to the tape recording, however, we are satisfied that any prejudice did not substantially outweigh the probative value of the evidence.

Defendant further argues the tape had little probative value because the information was merely cumulative of the victim's testimony. However, in *People v Schmitz*, 231 Mich App 521, 534-535; 586 NW2d 766 (1998), this Court found no error where the trial court admitted a tape recorded 911 call from a witness to a shooting. This Court found the trial court did not abuse its discretion although the tape was generally cumulative of the witness' testimony. *Id*. Defendant also contends he was prejudiced when the prosecution played the tape during rebuttal closing argument. However, defense counsel discussed the tape at length in his closing argument, suggesting that the victim was not thinking rationally when she called 911 because she was not getting enough oxygen. If a defendant makes a claim in his closing argument, the prosecutor may offer a rebuttal limited to the issue raised. MCR 6.414(E). Thus, the use of the tape was appropriate on rebuttal. We find no error.

Defendant next argues the trial court abused its discretion by denying defendant's motion for mistrial after a police officer's response to defense counsel's question indicated defendant had also been investigated in another case on the night of this offense. We disagree. A ruling on a motion for mistrial is committed to the sound discretion of the trial court. *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). The test is whether the defendant has been deprived of a fair trial. *Siler, supra* at 256.

A mistrial should only be granted where the error complained of is so serious that the prejudicial effect can be removed no other way. *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988). A mistrial should be granted only for an irregularity that is prejudicial to the defendant. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). If a prejudicial response could have reasonably been anticipated by defense counsel when cross-examining a prosecution witness, it is not cause for granting a mistrial. *People v Stegall*, 102 Mich App 147, 151; 301 NW2d 473 (1980). A nonresponsive volunteered answer to a proper question is not cause for granting a mistrial. *Id.*; *People v Stinson*, 113 Mich App 719, 726-727; 318 NW2d 513 (1982).

In *Stegall*, *supra* at 151, a prosecution witness stated on cross-examination that the defendant said he had been in prison before and had killed someone. Because the trial court told the jury to disregard the remark, this Court held the trial court did not abuse its discretion by refusing to grant a mistrial. *Id*. at 152.

In *People v Coles*, 417 Mich 523, 554; 339 NW2d 440 (1983), rev'd on other grounds *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), this Court held the trial court did not abuse its discretion by denying the defendant's motion for mistrial where a prosecution witness mentioned the

defendant had been involved in other similar drug transactions because the answer was short, was not prejudicial enough to warrant a mistrial, and could have been cured by an instruction. *Id.* at 554-555. Likewise, in *Stinson*, *supra* at 726, this Court held the trial court did not abuse its discretion where a prosecution witness revealed he had prior contact with the defendant, possibly making the jury aware of the defendant's juvenile record. This Court noted the answer was unresponsive, the trial court cautioned the officer to answer questions more directly, and also cautioned the jury to disregard the officer's previous answer. *Id.* at 727. Finally, in *People v Measles*, 59 Mich App 641, 642; 230 NW2d 10 (1975), this Court held that where a security officer stated when he was testifying that some of the notes he had regarding the defendant concerned another situation a month after the offense, the single unresponsive remark did not warrant a mistrial. Again, the remark was not elicited by the prosecutor, it was ordered stricken, and the trial court instructed the jury to disregard the remark. *Id.* at 642-643. Under these circumstances, this Court concluded, the defendant was not denied a fair and impartial trial. *Id.*

In the present case, Officer Bartshe's comment was not elicited by the prosecution, was unresponsive and volunteered, and the trial court sustained defense counsel's objection to the comment, ordered it stricken, and instructed the jury to disregard it. In light of the above case law, it is clear the trial court did not abuse its discretion in denying defendant's motion for mistrial. Defendant was not deprived of a fair trial.

Defendant next contends the trial court committed error requiring reversal by overruling defendant's objection to the testimony of an investigating officer that he did not check the victim's mental health records because he had no reason to believe she was lying. We disagree. The decision whether to admit or exclude evidence is within the trial court's sound discretion and will not be disturbed absent an abuse of discretion. *Lugo*, *supra* at 709.

To be properly admitted as rebuttal evidence, evidence must be introduced in response to a theory developed by the defendant. *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996). Rebuttal evidence may be used to contradict, repel, explain, or disprove evidence presented by the other party in an attempt to weaken and impeach it. *People v Kelly*, 423 Mich 261, 281; 378 NW2d 365 (1985). In *People v Bettistea*, 173 Mich App 106, 116; 434 NW2d 138 (1988), the defendant testified on direct examination that a prosecution witness was a liar and the prosecutor cross-examined the defendant about whether the prosecution witness had lied in his testimony. This Court concluded that because the defense brought out the issue, the questions by the prosecutor were proper. *Id.* In *People v Brand*, 106 Mich App 574, 577; 308 NW2d 288 (1981), this Court stated that the testimony of police officers regarding the defendant's actions and statements following his arrest was not presented for its substantive value, but to rebut testimony of a defense witness that the defendant was psychotic.

In this case, because defendant's attorney asked the witness questions regarding the witness' failure to obtain the victim's mental health records and asked if they could have revealed that the victim was a liar, the witness' response on redirect examination explaining why he had not obtained the records was appropriate. Furthermore, because the testimony was not elicited for its substantive value,

but to explain why the officer did not obtain the victim's mental health records, it did not amount to improper vouching for the witness. Reversal on this basis is not required.

Defendant also argues the trial court erred in failing to instruct the jury that, to find defendant guilty of CSC III, it must find beyond a reasonable doubt that the victim did not consent to the sexual act. We disagree. Where a defendant does not object to a jury instruction, this Court's review is limited to the issue whether manifest injustice occurred. *Haywood*, *supra* at 230.

The trial judge's instructions to the jury must include all the elements of the crime charged and must not exclude from the jury's consideration material issues, defenses, or theories if there is evidence to support them. *People v Paquette*, 114 Mich App 773, 779; 319 NW2d 390 (1982). To decide whether manifest injustice occurred, this Court reviews instructions as a whole. *People v Freedland*, 178 Mich App 761, 766; 444 NW2d 250 (1989). No error occurs even where the instructions are not perfect if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Davis*, 216 Mich App 47, 54; 549 NW2d 1 (1996).

In *People v Hearn*, 100 Mich App 749, 755; 300 NW2d 396 (1980), where the defendant in a criminal sexual conduct case interposed a consent defense, this Court found that the trial court's instructions on sexual penetration and the defendant being armed with a weapon were inadequate to instruct the jury on consent. However, as noted in *People v Jansson*, 116 Mich App 674, 687; 323 NW2d 508 (1982), the aggravating circumstance in *Hearn* was not force or coercion of the victim, but being armed with a weapon. In *Jansson*, *supra* at 682, as here, the offense of CSC III was accomplished by force or coercion. The *Jansson* Court stated that the question of consent is not necessarily implicated in a decision as to whether the defendant was armed with a weapon, but the issue of consent is necessarily implicated in a determination of whether the act was committed by force or coercion. *Id.* at 687.

In *People v Johnson*, 128 Mich App 618, 623; 341 NW2d 160 (1983), this Court also declined to find error requiring reversal where the trial judge did not define consent or inform the jury what effect a finding of consent would have on the defendant's guilt because the instructions given required the jury to find that penetration was accomplished by force or coercion; by implication, the instructions required that the jury find that the victim did not consent to sexual intercourse before it could find the defendant guilty. Similarly, in *Paquette*, *supra* at 781, the defendant was charged with CSC I involving sexual penetration with another while aided and abetted by another person to accomplish the penetration, MCL 750.520b(1)(d)(ii); MSA 28.788(2)(1)(d)(ii), and the trial court instructed the jury regarding force or coercion. This Court held the instructions were sufficient because the jury could not have convicted the defendant based on force or coercion if the victim had consented.

This reasoning of *Johnson* and *Paquette* applies in this case. The jury was informed that if the victim consented to sexual intercourse, the jury could not convict defendant based on the use of force. The trial court's failure to more fully instruct on consent did not amount to manifest injustice.

Finally, defendant argues that the trial court abused its discretion by imposing a disproportionately long sentence on defendant in light of his background and the severity of the offense.

We disagree. This Court reviews a trial court's sentence imposed on an habitual offender for an abuse of discretion. *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997). An abuse of discretion will be found if an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

It is within the discretion of the trial court whether to impose a sentence under the habitual offender act statutes. *People v Bewersdorf*, 438 Mich 55, 66; 475 NW2d 231 (1991), cert den sub nom *Johnson v Michigan*, 502 US 1111, reh den 503 US 999 (1992). If it is shown that a defendant, in the context of his previous felonies, demonstrates an inability to conform his conduct to the laws of society, a trial court does not abuse its discretion in sentencing within the statutory limits established by the Legislature. *Hansford*, *supra* at 326. In this case, defendant has an extensive criminal history, and the trial court's conclusion that defendant was resistant to reform and unable to conform his conduct to the law is supported by the presentence investigation report and the testimony of the witnesses at the sentencing hearing. The sentence imposed was within the statutory maximum of life imprisonment. See *Hansford*, *supra* at 326. Given defendant's status as a fourth habitual offender, the trial court did not abuse its discretion by imposing a sentence of twenty-five to fifty years in prison.

Affirmed.

/s/ Patrick M. Meter
/s/ Richard Allen Griffin
/s/ Michael J. Talbot