STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee	UNPUBLISHED December 12, 2000
v	No. 216174 St. Clair Circuit Court
JAMES VERNON GANSZ, Defendant-Appellant.	LC No. 98-001036-FC

Before: Smolenski, P.J., and Wilder and Meter, JJ.

PER CURIAM.

Defendant appeals by right from his conviction by a jury of kidnapping, MCL 750.349; MSA 28.581, and two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b; MSA 28.788(2). The trial court sentenced defendant to three concurrent terms of fifteen to forty years' imprisonment. We affirm.

Defendant first argues that the trial court should have granted his motion for a mistrial because the prosecutor did not disclose a statement defendant made to a police officer until after defendant testified. "We review a trial court's decision regarding the appropriate remedy for noncompliance with a discovery order for an abuse of discretion." *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997).

A defendant is entitled to have produced at trial all the evidence bearing on his guilt or innocence that is within the prosecutor's control. *People v Florinchi*, 84 Mich App 128, 133; 269 NW2d 500 (1978). While earlier case law suggests that prosecutorial noncompliance with a discovery order would result in reversal unless the failure to divulge was harmless beyond a reasonable doubt, see *People v Pace*, 102 Mich App 522, 530-531; 302 NW2d 216 (1980), more recent case law is consistent with MCR 6.201 and holds that questions of noncompliance with discovery orders or agreements are subject to the discretion of the trial court. *People v Taylor*, 159 Mich App 468, 487-488; 406 NW2d 859 (1987). The court must exercise discretion in fashioning a remedy for noncompliance. *Id.* at 487. To fashion a remedy, the court must determine the legitimate interests of the court and the parties involved and how they may be affected by the remedial choices available. *Id.* This process requires an inquiry into all the relevant circumstances, including the causes of the tardy or total noncompliance, as well as a showing by the objecting party of actual prejudice. *Davie, supra* at 598.

The use of a defendant's nondisclosed statements for impeachment purposes is permissible and generally is considered not prejudicial because a defendant is presumed to know of them. Thus, in *People v Lynn*, 91 Mich App 117, 126-127; 283 NW2d 664 (1979), where the defendant was impeached with a prior statement that had not been made available to him pursuant to a discovery order, this Court found no prejudicial error because the statement was made by the defendant, and the defendant was presumed to know what statements he had made. Similarly, in *Taylor, supra* at 487-488, this Court held that the defendant was properly impeached with a letter he wrote, despite the prosecution's nondisclosure of the letter, because the defendant had knowledge of the letter independent of discovery.

In this case, defendant clearly had knowledge of his own statement to the police officer independent of discovery, and therefore he was not in a position to claim prejudice from its use for impeachment purposes. Moreover, even ignoring the impact of the admission of the statement, the evidence against defendant was overwhelming. Under these circumstances, the trial court did not abuse its discretion in denying defendant's motion for a mistrial and allowing the statement at issue to be used for impeachment purposes.

Next, defendant argues that there was insufficient evidence to support his convictions. This Court reviews claims of the sufficiency of the evidence de novo. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). In evaluating whether the evidence introduced against a defendant supported a conviction, this Court views the evidence in the light most favorable to the prosecutor and determines whether a rational trier of fact could have found that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999).

The kidnapping conviction in the instant case was based on secret confinement. See *People v Jaffray*, 445 Mich 287, 297, 305-307; 519 NW2d 108 (1994). Defendant contends that no secret confinement occurred in this case because the victim was not restrained and was free to leave. We disagree.

Secret confinement occurs when the victim is unable to avail herself of the opportunity for outside help. *Id*. at 307. The essence of secret confinement as contemplated by the kidnapping statute is deprivation of the assistance of others by the virtue of the victim's inability to communicate her predicament. *Id*. at 305-309. To determine whether secret confinement occurred, the totality of the circumstances must be examined to determine whether the victim was deprived of the assistance of others. *Id*. at 309.

When looking at the totality of the circumstances in this case, a rational trier of fact clearly could have found, beyond a reasonable doubt, that secret confinement occurred. Deputy Thomas Buckley stated that when the police approached defendant's house, he could see a man and woman physically fighting and heard the man telling the woman to "shut up." The woman was trying to get away but the man held her and covered her mouth. The victim stated that when she realized the police were outside the house, she tried to bang on the window but could not do so because defendant was holding her back. She stated that defendant told her to be quiet and not to move and not to answer the door. The victim further testified that she was not free to leave the house or to make telephone calls during a three-day period. She testified that defendant hid the upstairs telephone so she could not use it and that defendant would not allow her to answer or

return calls from her ex-husband or the police. According to the victim, defendant was with her the whole three days except when he left to return a videotape; she did not leave the house then because the video store was very close and she had nowhere to go, and she explained that she did not call the police because she feared that defendant might return home and harm her before they responded to her telephone call. The victim further testified that defendant beat her up severely and sexually assaulted her during the three days.

Viewing this evidence in the light most favorable to the prosecutor, a rational trier of fact could have concluded, beyond a reasonable doubt, that the victim in this case was (contrary to defendant's argument) not free to leave, was unable to effectively communicate her predicament to others, and was therefore kidnapped.[1]

With regard to the CSC I conviction involving penile-vaginal intercourse, defendant contends that there was insufficient evidence to support the conviction because the victim consented to having intercourse. However, when viewing the evidence as a whole in the light most favorable to the prosecution, it is clear that the prosecutor presented sufficient evidence from which a rational trier of fact could have concluded, beyond a reasonable doubt, that the victim did not in fact consent to having sexual intercourse with defendant. The victim stated that in addition to causing her other physical injuries, defendant split her head open by throwing her against the headboard of a bed at some point before they had sexual intercourse. She stated that she told defendant "no" more than once but that defendant penetrated her anyway. She further stated that she did not consent to having sex with defendant but that, based on past experience, she knew he would have sex with her whether she wanted to or not. She explained that she did not fight against defendant because when she had tried to fight him off in the past, she had been unsuccessful. This evidence indicated that the victim was in fear and unable to stave off defendant. A rational trier of fact could have concluded, beyond a reasonable doubt, that the victim did not consent to having sexual relations with defendant.

With regard to both the CSC I convictions (which were based on penile-vaginal and manual/digital-anal intercourse), defendant argues that there was insufficient evidence to sustain the convictions because the victim suffered no personal injury in connection with the two alleged penetrations. However, the CSC I charges were based on the alternative theories of personal injury, MCL 750.520b(f); MSA 28.788(2)(f), and penetration occurring during a kidnapping, MCL 750.520b(c); MSA 28.788(2)(c). Because, as discussed *supra*, there was sufficient evidence to support the existence of a kidnapping, the CSC I convictions were supported by sufficient evidence even assuming, arguendo, that no personal injury occurred in connection with the sexual penetrations. See *People v Gadomski*, 232 Mich App 24, 28-32; 592 NW2d 75 (1998) (indicating that aggravating circumstances for a CSC I conviction are alternative theories on which jury unanimity is not required), and *People v Asevedo*, 217 Mich App 393, 397-398; 551 NW2d 478 (1996) (indicating that if two alternative CSC I theories not requiring jury unanimity are set forth, then a guilty verdict shall be sustained even if only one of the theories is supported

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[1] Defendant additionally contends that a kidnapping conviction may not be based on a victim's confinement in her own house. This contention is without merit. See *Jaffray, supra* at 312 n 37.

by sufficient evidence). A rational trier of fact could have concluded that the elements of each CSC I conviction were proven beyond a reasonable doubt. See *Johnson, supra* at 723.

Finally, defendant argues that he was denied the effective assistance of counsel because his trial attorney failed to determine before trial that witness Hedy Nuriel was an expert on battered women's syndrome and therefore failed to adequately prepare for Nuriel's testimony or to secure a corresponding expert on defendant's behalf.

This Court presumes the effective assistance of counsel, and a defendant's burden to prove otherwise is a heavy one. *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). To determine whether ineffective assistance of counsel occurred, this Court must determine (1) whether counsel's performance was objectively unreasonable, and (2) whether the defendant was prejudiced by counsel's defective performance. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To convince this Court of prejudice, a defendant must establish "a reasonable probability that, but for counsel's errors, the result [of the proceedings] would have been different." *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999), quoting *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). Here, because defendant did not raise the issue of ineffective assistance of counsel in the trial court, our review is limited to mistakes that are apparent from the record. *People v Dixon*, 217 Mich App 400, 408; 552 NW2d 663 (1996).

Even assuming that counsel's performance was deficient in the instant case, defendant has failed to demonstrate prejudice. First, defendant's attorney cross-examined Nuriel regarding whether different people in the same circumstance react to a situation differently and asked if Nuriel thought people have free will. Second, as noted by the prosecution, Nuriel's testimony concerned the behavior of battered women in general; her testimony was not specifically about defendant's conduct. Third, the judge gave a limiting instruction regarding the testimony. Fourth, defendant has presented (1) no affidavit or other documentation indicating that his attorney could have obtained an expert defense witness to counter Nuriel's testimony, and (2) no argument indicating how a better-prepared defense attorney would have more effectively cross-examined Nuriel. Finally, the evidence of defendant's guilt was strong, even in the absence of Nuriel's testimony. Under these circumstances, defendant has not met his burden of showing that his trial attorney's representation prejudiced him, and he is therefore not entitled to a new trial.

Affirmed.

/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder
/s/ Patrick M. Meter