

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM THOMAS JACKSON, JR.,

Defendant-Appellant.

UNPUBLISHED

February 16, 2001

No. 210684

Genesee Circuit Court

LC No. 97-001153-FC

Before: Kelly, P.J., and White and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of third-degree criminal sexual conduct, MCL 750.520d(1)(b); MSA 28.788(4)(1)(b). The trial court sentenced defendant as a second habitual offender, MCL 769.10; MSA 28.1082, to six to fifteen years' imprisonment. We affirm.

Defendant argues that the trial court erred in denying his motion for a mistrial because the emergency room physician who attended to the complainant improperly opined that a sexual assault had taken place and bolstered the complainant's credibility. We disagree.

This Court reviews a trial court's ruling on a motion for a mistrial for an abuse of discretion. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). An abuse of discretion occurs only where the court's action is so violative of fact and logic as to constitute a perversity of will or defiance of judgment. *People v Laws*, 218 Mich App 447, 456; 554 NW2d 586 (1996). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant, and impairs his ability to get a fair trial." *Haywood, supra* at 228.

Credibility of witnesses is a matter for the trier of fact to ascertain. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). "An expert cannot be used as a human lie detector to give a stamp of scientific legitimacy to the truth or falsity of a witness' testimony." *People v Graham*, 173 Mich App 473, 478; 434 NW2d 165 (1988), citing *People v Izzo*, 90 Mich App 727, 730; 282 NW2d 10 (1979). A physician testifying as an expert in a sexual assault case may not offer a purely subjective opinion that the complaining witness told the truth. *People v Smith*, 425 Mich 98, 109, 113; 387 NW2d 814 (1986). Nor may an expert testify to a belief that the defendant raped the complainant at a specific time or place. *Id.* at 110-111. However, "[i]t is . . . well-established that expert opinion testimony will not be excluded simply because it concerns

the ultimate issue” *Id.* at 106, citing MRE 704. The critical inquiry is whether the physician’s opinion that a complaining witness had been forcibly penetrated stemmed from the physician’s objective observations pursuant to his or her area of expertise. *Id.* at 115. Where a jury must weigh the allegation of forced penetration against the defense of consent, an expert’s opinion on forcible penetration is proper so long as the opinion is based upon a proper factual foundation. *Id.*

In this case, the expert’s opinion that the medical evidence strongly comported with the allegations of forced penetration objectively flowed from the expert’s examination, experience, and training. The expert never opined specifically that *defendant* had assaulted the complainant, or that an assault had taken place at a particular time or place, but simply that the complainant had been assaulted. Thus, the expert’s statements concerning her belief that forcible penetration had occurred were based on a proper medical foundation. *Smith, supra* at 115.

Defendant also argues that the expert witness bolstered the credibility of the complainant by testifying “I believed the patient. I believed that she was sexually assaulted, and in my opinion, the injuries certainly are . . . most likely caused by forced penetration.” Defense counsel neither raised an objection to the testimony nor requested a cautionary instruction at the time the statement was made; rather, counsel remained silent during trial and then requested a mistrial at the conclusion of the proceedings.

Not every instance of mention before a jury of an inappropriate subject matter warrants a mistrial. Specifically, “an unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial.” *Haywood, supra* at 228. In this case, the expert’s statement came in response to the prosecutor’s question, “[h]ow did the finding, two tears to the posterior fourchette and an abrasion, how did that fit with your history?” Because the question inquired about medical evidence, not the complainant’s credibility, to the extent that the expert’s response related to the latter, it was a nonresponsive answer to a proper question. A mistrial is not warranted under these circumstances. *Haywood, supra*.

Further, because defendant allowed the challenged testimony to continue without objection and, in fact, cross-examined the expert concerning her belief that the complainant suffered forced penetration, the complainant’s behavior relative to what is normal for rape victims, and the complainant’s description of her misadventure, defendant should not be heard to complain on appeal about the witness’ “repeated” discussions of the subject matter. See *Phinney v Perlmutter*, 222 Mich App 513, 537; 564 NW2d 532 (1997) (error requiring reversal cannot be error to which the aggrieved party contributed, by plan or negligence). To allow defendant to assign error on appeal to something which his own counsel deemed proper at trial would allow defendant to harbor error as an appellate parachute. *People v Roberson*, 167 Mich App 501, 517; 423 NW2d 245 (1988).

Finally, we note that the trial court explicitly instructed the jury that expert opinions should be considered only insofar as they concerned the expert’s specialty, and to disregard any

testimony that vouched for the truthfulness of any other witness in the case. For these reasons, we conclude that the trial court properly denied defendant's request for a mistrial.¹

Defendant next argues that the trial court erred in admitting evidence of his prior criminal convictions for purposes of impeachment under MRE 609 because the trial court's analysis of the probative value of the impeachment evidence against its potential for prejudice was improper. We disagree.

We review a trial court's evidentiary ruling for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). A decision on a close evidentiary question ordinarily cannot be deemed an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659, quoting *People v Golochowicz*, 413 Mich 298, 322; 319 NW2d 518 (1982). We conclude that the trial court applied the correct legal test and, thus, evidence of defendant's prior convictions was properly admitted.

Over defendant's objection, the trial court granted the prosecutor's request to impeach defendant with his prior convictions under MRE 609 in the event he took the stand. The trial court ruled that defendant's 1992 convictions for breaking and entering and unarmed robbery could be used for impeachment purposes because both convictions occurred within the last ten years, both contained an element of theft, and both were punishable by imprisonment in excess of one year. The trial court further determined that the probative value of the evidence outweighed any prejudicial effect, stating:

In this case, even though there are other witnesses who may or may not corroborate each sides' view of the evidence; in effect a large part of this trial boils down to a "he said-she said" situation. I do find that these convictions do have a significant probative value on that issue, and the offense for which [defendant] is on trial here is criminal sexual conduct in the first degree. The prejudicial value comes about when the crime for which he is on trial is similar to the prior convictions; and if that were the case, this Court's ruling might be different, but in this case, the breaking and entering and unarmed robbery convictions, I do not believe are similar to the charge here, and I will permit evidence of these convictions to be used to impeach [defendant] should he testify.

¹ By way of a footnote, defendant also points to one instance where the witness testified that the complainant had told her specifically that defendant had raped her, arguing that this was improper hearsay evidence identifying defendant as the offender. However, there was no objection to that testimony at trial, leaving the hearsay question unpreserved. MRE 103(a)(1). Further, defendant does not raise the hearsay question as an issue on appeal, thus failing to properly present it for this Court's review. MCR 7.212(C)(5). Finally, because the only issue at trial was that of consent, not identity, and because this piece of evidence was cumulative of abundant other evidence that the complainant identified defendant as her assailant from the beginning, defendant suffered no prejudice from this testimony. For these reasons, we will not further consider defendant's incidental argument.

Defendant maintains that the trial court's analysis of the probative value versus the prejudicial impact of the evidence, particularly the trial court's recognition that credibility was a large factor in this case, ran afoul of our Supreme Court's command that, for "an objective analysis," only "the degree to which the crime is indicative of veracity and the vintage of the conviction" are to be considered, "*not either party's need for the evidence.*" *People v Allen*, 429 Mich 558, 606; 420 NW2d 499 (1988) (emphasis added).

We are not persuaded that the trial court's analysis or its decision to admit the evidence was improper. The trial court's remarks when admitting the evidence suggest a recognition that credibility was at issue, and therefore the court was entitled to weigh the probative value of the fact that defendant had prior theft convictions, which were indicative of veracity, against the prejudice of introducing the non-similar convictions. We do not find any indication in the record that the trial court based its ruling on the prosecution's "need" for evidence of defendant's prior convictions to obtain a conviction. Further, the trial court properly determined that because the conduct at issue in this case is distinct from that giving rise to defendant's theft convictions, neither of which include an element of sexual or violent activity, the offenses were sufficiently dissimilar to assuage concerns of prejudice. Accordingly, the trial court did not abuse its discretion in admitting evidence of defendant's prior convictions.

Affirmed.

/s/ Michael J. Kelly

/s/ Helene N. White

/s/ Kurtis T. Wilder