STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT W. REEVES,

Defendant-Appellant.

UNPUBLISHED
September 20, 2002

No. 223454
Wayne Circuit Court
LC No. 99-000496

Before: O'Connell, P.J., and Griffin and Hoekstra, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of three counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(c), one count of assault with intent to commit CSC involving penetration, MCL 750.520g(1), two counts of armed robbery, MCL 750.529, and one count of possession of a firearm during the commission of a felony, MCL 750.227b(1). Defendant was sentenced as a third habitual offender, MCL 769.11, to twenty to thirty years for each of the first-degree CSC convictions, ten to twenty years each for the armed robbery convictions, five to ten years for the assault conviction, and two years for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that his jury waiver was invalid because it was not knowingly or understandingly made. Because defendant never challenged the validity of his jury waiver in the trial court, this issue is unpreserved and appellate relief is precluded absent a plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The record of defendant's jury waiver sufficiently establishes that defendant understood that he had a right to a jury trial and was voluntarily waiving that right. MCR 6.402(B); *People v Shields*, 200 Mich App 554, 560-561; 504 NW2d 711 (1993). Contrary to what defendant argues, the court was not required to explain the unanimity required in a jury trial compared to a bench trial. *People v Leonard*, 224 Mich App 569, 596; 569 NW2d 663 (1997). Nor was the court required to specifically ask defendant whether he was threatened or promised anything before accepting his waiver. *Shields*, *supra*. Plain error has not been shown.

Next, defendant argues that the trial court abused its discretion by allowing two witnesses to testify about statements made by one of the victims under the excited utterance exception to

the hearsay rule, MRE 803(2). We review the trial court's decision to admit the evidence for an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998).

The victim testified that she was sexually assaulted by defendant during the drive back to the parking lot, and that she spoke to the witnesses shortly after arriving at the lot. Additionally, the witnesses (and others) testified that the victim was upset, crying, and hysterical. The evidence sufficiently demonstrated that the victim was still under the stress and excitement of a startling event when she spoke to the witnesses regarding the event. The trial court did not abuse its discretion in admitting the testimony under MRE 803(2). *Smith*, *supra* at 550; see also *People v Straight*, 430 Mich 418, 424; 424 NW2d 257 (1988).

Defendant next argues that there was insufficient evidence to support the court's verdict on counts 1 and 12 and, in the alternative, that the court's verdicts for those counts were against the great weight of the evidence. We disagree.

The sufficiency of the evidence is evaluated by reviewing the evidence in a light most favorable to the prosecution. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985). The test is whether a rational trier of fact could find every element of the crime proved beyond a reasonable doubt. *Id.* at 269-270. Resolving credibility disputes is within the exclusive province of the trier of fact. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990).

Count 1 alleged vaginal penetration of one of the victims, MCL 750.520b(1)(c). Count 12, as amended at the close of the prosecutor's proofs, alleged assault with intent to commit anal penetration of another victim, MCL 750.520g(1). The victims testified that the charged acts were committed by one of the other perpetrators. In order to convict defendant as an aider and abettor in connection with those counts, the prosecutor was required to prove that defendant performed acts or gave encouragement that aided or assisted in the commission of the crimes, and, at the time he gave aid or assistance, either intended to commit the crimes or knew that the principal intended to commit the crimes. *People v Jones (On Rehearing)*, 201 Mich App 449, 451; 506 NW2d 542 (1993).

Viewed most favorably to the prosecution, the evidence showed that defendant was acting in concert with two other two men to rob the victims, and that he drove them to a secluded location, made them strip, and sexually assaulted them. This evidence sufficiently demonstrated that defendant's complicity enabled the other two perpetrators to vaginally penetrate one victim and attempt to anally penetrate the other. The evidence also indicated that defendant robbed and sexually assaulted the victims himself, thereby demonstrating that he shared the intent to commit these crimes. Thus, the evidence was sufficient to support defendant's convictions for counts 1 and 12.

Further, the evidence does not preponderate heavily against the court's verdict and, therefore, the trial court's guilty verdicts are not against the great weight of the evidence. Although defendant raises questions concerning the victims' credibility, their testimony was not so far impeached as to be deprived of all probative value. See *People v Lemmon*, 456 Mich 625, 643, 645-646; 576 NW2d 129 (1998). Thus, the victims' credibility was for the trial court, as the trier of fact, to resolve. *Id.* at 644, 646-647.

Defendant also argues that the trial court's guilty verdict for counts 3, 10, 19, and 20, were against the great weight of the evidence. We again disagree.

Count 3 alleged digital anal penetration of one victim, MCL 750.520b(1)(c), count 10 alleged vaginal penetration of the other victim, MCL 7 50.520b(1)(c), and counts 19 and 20 alleged armed robbery of both victims, MCL 750.529. The victims testified that defendant personally committed each of the charged acts. Again, the credibility of the victims' testimony was for the trial court to resolve. *Lemmon*, *supra* at 643, 645-646. Defendant has not demonstrated that their testimony was deprived of all probative value. *Id.*

Next, in a brief filed in pro per, defendant alleges that defense counsel was ineffective. We disagree.

Where, as here, a defendant fails to move for a new trial or a *Ginther*[1] hearing, appellate review of an ineffective assistance of counsel claim is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

The record does not support defendant's claim that defense counsel, during closing arguments, stated that defendant had previously told her that he had a sexual relationship with one of the victims. Rather, counsel stated that defendant had claimed from the beginning that he knew the victims. Moreover, defendant testified at trial that he had just brought the allegation of a sexual relationship to counsel's attention. The record does not indicate that counsel positioned herself against defendant, created a conflict of interest, or otherwise committed prejudicial error in addressing this situation.

Next, as previously discussed, the record does not establish that defendant's jury waiver was invalid. Further, the record does not establish that defendant's decision to waive a jury was based on improper advice from counsel.

We also reject defendant's claim that counsel was ineffective for failing to impeach the victims with their preliminary examination testimony or a police report. Both victims testified at trial that they had never seen or met defendant before. At the preliminary examination, both testified that they had learned defendant's name after identifying him in a police lineup. Against this backdrop, defendant has failed to show that counsel was ineffective by failing to impeach one of the victims with her preliminary examination testimony, where she referred to defendant by his proper name. *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997). Additionally, at trial, two witnesses testified that they saw one of the victims follow defendant (or another perpetrator) around the parking lot immediately before the police arrived. Given this testimony, defendant has failed to show that counsel was ineffective by failing to impeach one of the witnesses with a police report wherein the witness allegedly told a police officer that he had seen one of the victims follow defendant around the parking lot just before the police arrived. *Id*.

Defendant argues that counsel was ineffective in failing to use an accurate medical report to rehabilitate one of his witnesses. However, given the evidence on the record, there is no

---

[1] *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973).

reasonable probability that rehabilitating the witness would have affected the outcome. *People v Pickens*, 446 Mich 298, 312-314; 521 NW2d 797 (1994).

Similarly, although there was testimony that defendant's left ring finger was injured, defendant admitted under oath that he could bend the other fingers in his left hand, but that it hurt. No one testified that it was physically impossible for defendant to anally penetrate the victim with his *right* hand while driving with his left hand. Thus, defendant has failed to show that the introduction of medical evidence documenting the extent of his injury would have affected the outcome. *Id*.

Defendant has also failed to show that introduction of his friend's telephone records might have affected the outcome. *Id*. Even accepting that the records show that defendant's friend called a pay telephone located in the parking lot and spoke to defendant for four minutes, there was still an hour between the end of that telephone call and the time of defendant's arrest, as shown in the police report, during which defendant could have committed the crimes.

Defendant has failed to demonstrate that counsel was ineffective by withdrawing the motion to suppress defendant's statement to the police. Defendant now argues that the statement was involuntary because he was under the influence of prescription drugs, and because he was promised leniency in exchange for his cooperation. He also claims that the police officer who took the statement substantially altered what he actually told the officer.

At trial, defendant stated that he initialed each of his answers and signed the statement under the belief that he was initialing all the wrong answers and that the statement would be rewritten. On cross-examination, however, the prosecutor demonstrated that defendant had initialed both the true answers, *and* those that he was now claiming were false. In its findings of fact, the trial court stated that it did not believe defendant's claim that he signed the statement without reading it. Thus, the court rejected defendant's claim that he did not make the statements that were attributed to him. See *People v Neal*, 182 Mich App 368, 371, 372; 451 NW2d 639 (1990); *People v Weatherspoon*, 171 Mich App 549, 554; 431 NW2d 75 (1988).

Additionally, there is no support for defendant's claim that he was under the influence of prescription drugs. When he made the statement, defendant answered and signed a form stating that he was not threatened or promised anything in exchange for his statement, and that he was not under the influence of prescription drugs. Defendant had been in custody for about sixteen to eighteen hours when he made the statement, and there is no indication that he was allowed to continue taking prescription pain medication after he was arrested, or that the effects of the medication he took lasted as long as sixteen hours.[2] Moreover, defendant testified that he could read and write, and that he understood his rights.

Furthermore, defendant claimed at trial that the police promised to let him go if he helped them find the other two perpetrators, and told him that they would *not* let him go if he failed to make a statement. The officer involved denied these allegations. Defendant does not allege any

[2] The documentation submitted by defendant on appeal states that the medication may be taken every four to six hours, as needed.

other acts of police intimidation, coercion, or deception. See *People v Daoud*, 462 Mich 621, 637-639; 614 NW2d 152 (2000). Contrary to defendant's argument, no reasonable person would believe that the police were going to set defendant free if he gave a statement and helped find the other perpetrators. See *People v Conte*, 421 Mich 704, 740, 750; 365 NW2d 648 (1984); *People v Butler*, 193 Mich App 63, 69; 483 NW2d 430 (1992). Although the trial court did not address the voluntariness issue directly, it found that defendant's testimony (that he signed the statement without reading it) was not credible, because defendant had prior convictions and knew that his statement would be used against him. There is no reason to believe that the court would have believed defendant's testimony at an evidentiary hearing when it did not believe him at trial.

Against this backdrop, defendant has not shown that counsel erred by withdrawing the motion to suppress, or that, had the motion not been withdrawn, there is a reasonable probability that it would have been decided in defendant's favor. Thus, defendant has failed to show that defense counsel was ineffective in this regard. See *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

Having failed to find a single error by defense counsel, we also reject defendant's claim that the cumulative effective of multiple errors requires reversal. *Daoud*, *supra* at 16.

Defendant also argues that he was deprived of his right to retained counsel of his choice because he was represented at trial by the attorney who he originally retained. We find no merit to this issue. The attorney who represented defendant at trial was the same person who represented him at the preliminary examination and at every proceeding and matter thereafter. Defendant never once complained that he was not being represented by the attorney of his choice. He cannot be allowed "to harbor error as an appellate parachute." *People v Shuler*, 188 Mich App 548, 552; 470 NW2d 492 (1991).

Defendant next argues that he was deprived of due process because the police and prosecution failed to reveal that one of the victims misidentified a perpetrator during a photographic lineup. Due process requires the prosecution to disclose evidence that is favorable to the defendant and material to the determination of guilt or punishment. *People v Fink*, 456 Mich 449, 454; 574 NW2d 28 (1998). "Evidence is material only if there is a reasonable probability that the trial result would have been different, had the evidence been disclosed." *Id.* Although defendant asserts that the victim identified the wrong person at a March 1999 showup, he fails to disclose which, if any, of the six photos in the lineup was his (or another perpetrator's). In other words, defendant has failed to show that there was an actual misidentification. Furthermore, identity was not a contested issue at trial. Accordingly, defendant has failed to show that material, exculpatory evidence was withheld.

We have examined the additional documentation and evidence submitted by defendant on appeal and are not persuaded that remand for additional proceedings is warranted.

Affirmed.

/s/ Peter D. O'Connell
/s/ Richard Allen Griffin
/s/ Joel P. Hoekstra