

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PETER JOSEPH SUTTON,

Defendant-Appellant.

UNPUBLISHED

November 12, 2002

No. 234680

Roscommon Circuit Court

LC No. 00-004003

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

PER CURIAM.

Following a jury trial, defendant was convicted of third-degree criminal sexual conduct, MCL 750.520d(1)(c) and was sentenced as an habitual offender, second offense, MCL 769.10, to a prison term of 84 to 270 months. He appeals as of right. We affirm.

The female victim and two of her male friends, defendant and “Nate” went together on an overnight hunting trip. The three friends drank beer and liquor around the campfire. Nate left the other two and went to sleep in a trailer. The victim and defendant later went to sleep fully clothed in a tent. According to the victim, at some time before five a.m., she awoke and found herself partially unclothed with defendant penetrating her vaginally with his penis. She exclaimed, “What the f*** are you doing?” He said, “I can’t believe you are not Tish,” a reference to the name of his girlfriend.

Defendant was charged with violating MCL 750.520d(1)(c), which prohibits sexual penetration when “the actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.” “Physically helpless” includes being asleep. MCL 750.520a(i).

Defendant first argues that the case should be remanded for a *Ginther*¹ hearing to develop a record concerning whether trial counsel was ineffective for failing to investigate the victim’s actions on the evening after the incident. We note that another panel of this Court previously denied defendant’s motion to remand for an evidentiary hearing, filed with a supporting affidavit, because the Court was not persuaded of the need for remand at that time. We likewise conclude that remanding the case is unnecessary. The affidavit is signed by an individual who

¹ *People v Ginther*, 390 Mich 426; 212 NW2d 922 (1973).

claims to have seen the victim “partying throughout the evening as if nothing traumatic or out of the ordinary occurred.” Contrary to defendant’s argument, this affidavit does not suggest that trial counsel failed to investigate. The individual who signed the affidavit was listed as a possible witness for the defense. Although trial counsel did not call the witness to testify at trial, this decision does not suggest a lack of investigation. Defendant has not shown that the case merits a remand for an evidentiary hearing on this issue. *People v Ho*, 231 Mich App 178, 191; 585 NW2d 357 (1998).

Defendant next argues that the case should be remanded for an evidentiary hearing concerning the “newly discovered evidence,” specifically the account of the potential witness referenced above. To obtain a new trial on the basis of newly discovered evidence, a defendant must show that the evidence is newly discovered, not cumulative, would probably have caused a different result and was not discoverable and producible at trial with reasonable diligence. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). Trial counsel’s inclusion of this individual on the defense witness list shows that this evidence is not newly discovered and was discoverable and producible at trial. Moreover, newly discovered evidence is not a ground for a new trial where, as here, it would be used for impeachment purposes. *Id.* 516. Therefore, defendant is not entitled to relief on this basis.

Finally, defendant argues that the court abused its discretion by precluding defendant from arguing consent as a defense during closing argument.

Defense counsel asked the court to instruct the jury concerning consent pursuant to CJI2d 20.27. The court refused the request because the court determined that there was no evidence of consent.² Defense counsel asked the court if its ruling precluded counsel from arguing consent to the jury on the basis of reasonable inferences from the facts. Defense counsel asserted that the victim’s consent could be reasonably inferred from her choice to sleep in a tent with defendant, the implausibility of her claim to be asleep while defendant removed her clothing and penetrated her, and the physical evidence that did not show injury consistent with forced intercourse. The court disagreed with counsel’s assessment of the evidence and explained that, in the absence of evidence of consent, counsel’s argument would in effect be a request for jury nullification. In addition, the court expressed its concern that the prosecution had not had the opportunity to present evidence showing the absence of consent because there had not been any evidence to put the affirmative defense of consent into controversy.³ The court ruled that defense counsel could not raise the issue of consent during his closing argument, but could argue “general credibility.”

The general principles concerning the proper scope of closing arguments in criminal trials are most often stated in the context of defense challenges to the prosecution’s closing arguments. Case law establishes that the prosecution may argue the evidence and all reasonable inferences from the evidence as it relates to the prosecution’s theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). However, we have held that there must be a factual basis for the intimations made, and “[i]nnuendo has no place in a criminal trial.” *People v Marchese*,

² Defendant does not challenge the court’s refusal to instruct the jury concerning consent pursuant to CJI2d 20.27.

³ In this regard, the court cited *People v Thompson*, 117 Mich App 522; 324 NW2d 22 (1982).

84 Mich App 775, 777; 270 NW2d 687 (1978); *People v Pauli*, 138 Mich App 530, 543; 361 NW2d 359 (1984). These holdings are equally applicable in determining whether the court abused its discretion by limiting the scope of defendant's closing argument. *People v Green*, 34 Mich App 149, 152; 190 NW2d 686 (1971); *People v Edwards*, 55 Mich App 256, 264; 222 NW2d 203 (1974). The court has a duty to limit the argument of the prosecution and the defense to "relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved." MCL 768.29.

Consent was not a material issue in this case. There was no evidence that prior to the incident, the victim consented to sexual relations with defendant. To the extent that defense counsel wanted to make such an argument, the trial court properly excluded it. Consent during the incident was relevant only inasmuch as the victim's ability to indicate consent shows that she was not "physically helpless" i.e. "unconscious, asleep, or for any other reason is physically unable to communicate unwillingness to an act." MCL 750.520a(i). Thus, the disputed issue in this case was not whether the victim consented, but rather whether she was "physically helpless," and therefore, unable to consent. The trial court did not abuse its discretion by refusing to allow defense counsel to argue consent when that issue was not material to the outcome of the case. Moreover, the error, if any, was harmless. The court's ruling did not prevent defense counsel from arguing that the victim's account was implausible and not supported by the physical evidence. Defense counsel further suggested that her objection to the sexual activity was due to defendant's ejaculation, which caused her to be concerned about pregnancy. Although defense counsel did not explicitly refer to "consent" during closing argument, the trial court's ruling did not prevent defense counsel from effectively arguing the defense theory of the case.

Affirmed.

/s/ Donald S. Owens

/s/ Michael J. Talbot

/s/ Patrick M. Meter