STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 14, 2006
v	No. 263020 Mason Circuit Court
BENJAMIN HAYNES COLLINS, Defendant-Appellant.	LC No. 04-191405-FH

Before: Whitbeck, C.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of third-degree criminal sexual conduct (CSC III), MCL 750.520d. The complainant testified that, when she and defendant went to his home while on a lunch break, he forcibly sexually assaulted her. We affirm.

On appeal, defendant first asserts that the trial court abused its discretion by denying his motion for a new trial on the basis that he was denied an impartial jury. This Court reviews de novo alleged errors involving the seating of jurors. *People v Manser*, 250 Mich App 21, 24; 645 NW2d 65 (2002). This Court reviews a trial court's decision to deny a motion for a new trial for an abuse of discretion. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

A criminal defendant has the right to have his case tried before an impartial jury. Const 1963, art 1, § 20. Generally, "when information potentially affecting a juror's ability to act impartially is discovered after the jury is sworn, the defendant is entitled to relief only if he can establish (1) that he was actually prejudiced by the presence of the juror in question or (2) that the juror was properly excusable for cause." *Daoust*, *supra* at 9.

In this case, some time after the trial concluded, it came to light that during deliberations one of the jurors had apparently compared her own sexual experiences to date rape, and indicated that because of these experiences she was willing to accept the complainant's testimony even though she had delayed reporting the alleged rape. However, at the hearing on defendant's motion for a new trial, the challenged juror denied ever having been sexually assaulted and indicated that her comments during the jury's deliberations concerned "unwise" but not forcible sexual acts that she had engaged in when she was younger.

Jurors are permitted to "view the evidence presented in the light of their general knowledge of the field embraced within the scope of the inquiry." *People v Schmidt*, 196 Mich App 104, 108; 492 NW2d 509 (1992). This is what the juror in question was doing. She was evaluating the evidence in light of her own life experiences relative to uncomfortable sexual situations, although not rising to the level of criminal sexual conduct, and thereon, decided to accept the evidence that the complainant's delayed reporting did not necessarily require the conclusion that the complainant was lying about what occurred.[1] We conclude that that challenged juror was not excusable for cause. As the trial court noted, the "unwise" sexual experience of the challenged juror was very different from what allegedly took place in this case. Specifically, the challenged juror testified that she was not forced to do anything against her will. Moreover, there is no evidence that the challenged juror was biased against defendant, had predetermined the outcome of the case, was interested in a question like the issue to be tried, or was otherwise susceptible to a challenge for cause under the court rules. MCR 6.412(D)(1); MCR 2.511(D). This case is distinguishable from *Manser, supra*, in which this Court indicated that a juror would be properly excusable for cause from sitting on a jury trying a case involving criminal sexual conduct if the juror had previously been victimized by sexual misconduct because the psychological effect of being victimized would be to render the former victim interested in the question being tried. *Id.* at 28 n 5. In this case, there is simply no evidence that the challenged juror was previously victimized by sexual misconduct.

Finally, we conclude that the challenged juror was not "less than forthcoming with information that should have been revealed in response to questions posed during the voir dire." *Manser, supra* at 29. At most, the juror's history was tangentially related to the issues being tried. She was not a victim of a sexual assault. Her own history simply involved what she viewed as unwise sexual acts. There is no evidence that she lied during voir dire or failed to reveal information that was relevant to the specific questions posed or to the proceedings in general.[2] Thus, the juror cannot be said to have failed to reveal a matter that deprived her of the

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[1] We note that this juror already informed defense counsel during voir dire that the delayed reporting of the criminal sexual conduct would not make a difference to her because reporting such events would be difficult. We also disagree with defendant's comparison of the juror's sexual experiences to the events that occurred here, where there was evidence of a physically forceful, nonconsensual act against the victim.

[2] The *Daoust* panel recognized that pre-1990 cases had provided for reversal when there was information potentially affecting a juror's ability to act impartially and the defendant would have dismissed the juror by exercising a peremptory challenge had the information been timely revealed. *Daoust, supra* at 7-8. *Daoust* rejected the case law, finding that it would be too difficult for a court to determine in hindsight whether a defendant would have exercised a peremptory challenge. *Id.* at 9. However, the panel specifically limited its ruling by noting that "our holding does not address situations in which it is discovered that one of the jurors has lied during voir dire. Here, there was no indication that the juror in question purposefully provided any false answers during voir dire." *Id.* at 9 n 3. The *Manser* panel, distinguishing *Daoust*, found that it was presented with facts in which a juror failed to disclose information that she absolutely should have come forward with and that it would not be too difficult to determine in hindsight whether the defendant would have exercised a peremptory challenge considering the circumstances; therefore, consideration of a potential peremptory challenge was appropriate.
(continued…)

ability to act impartially, and defendant cannot claim that he was denied a fair trial on this basis. *People v Larry Smith* (*After Remand*), 122 Mich App 202, 207; 332 NW2d 401 (1981). Accordingly, we conclude that defendant has failed to show that he was denied an impartial jury, and the trial court did not abuse its discretion in denying his motion for a new trial on this basis.

Defendant next asserts that the trial court erred when it permitted Christine Warne to testify as an expert on typical victim responses to sexual assault. However, this issue was waived during trial. Specifically, after conducting voir dire of Warne concerning her qualifications, defendant's trial counsel specifically declined to challenge Warne's status as an expert witness. Because he approved of Warne's qualification to testify as an expert, defendant's trial counsel waived review of this issue. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). The waiver binds defendant on this evidentiary issue because it does not relate to the waiver of a fundamental right such as the right to counsel. *Id*. at 218. Therefore, this issue is not subject to review on appeal because the waiver extinguished any error. *Id*. at 215.

On appeal, defendant also asserts that he was denied effective assistance of counsel. Determination of whether a defendant has been denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews the trial court's factual findings for clear error, while its constitutional determinations are reviewed de novo. *Id*.

To establish ineffective assistance of counsel, defendant must show (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, (2) that there is a reasonable probability that but for counsel's error the result of the proceedings would have been different, and (3) that the attendant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant argues that his trial counsel was ineffective because he failed to call several additional witnesses to testify. First, defendant argues that his trial counsel should have called registered nurse Kimberly Dobias to testify on his behalf. At the motion for a new trial, Dobias testified that she worked at the local county health department office. Dobias testified that although she could not recall meeting the complainant, her paperwork indicated that the complainant had come into her office a few days after she was allegedly raped. Dobias was originally scheduled to testify by defendant's trial counsel in order to help pinpoint when the incident occurred. However, defense counsel testified that her testimony on this point was not needed because the information came out in another manner.

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Manser, *supra* at 29. Here, the evidence did not establish that the juror lied, nor that she was less than forthcoming during voir dire, and it would be too difficult in hindsight to determine whether defendant would have exercised a peremptory challenge. Again, we note that the juror informed counsel during voir dire that delayed reporting would not make a difference to her because it would be understandable, yet no peremptory challenge was exercised. Our review is properly limited to actual prejudice and challenges for cause as provided in *Daoust.* Additionally, we cannot help but note that testimony at the evidentiary hearing following trial revealed that the challenged juror was the last juror to decide that defendant was guilty.

Defendant must overcome the presumption that the challenged action was sound trial strategy. *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001). Decisions regarding whether to call or question a witness are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Defendant argues that Dobias should have been called to rebut Warne's testimony concerning the likelihood that the complainant would not have immediately reported the sexual assault. However, defendant has not asserted on appeal that Dobias was qualified to testify as an expert witness concerning behavioral patterns of sexual assault victims. Nor is it clear that her opinion testimony on that issue would have been admissible if she testified as a lay witness because her opinion did not rely on her perception as required by MRE 701. Rather, Dobias simply testified that she believed victims would be comfortable around her, so they should have felt free to open up to her. From this evidence, we conclude that Dobias' opinion testimony was not clearly admissible, and, accordingly, defendant has failed to show that his trial counsel's failure to have Dobias testify indicates that his performance fell below an objective standard of reasonableness. *Rodgers*, *supra* at 714.

Defendant also asserts that his trial counsel erred by not having Joseph Underwood testify. At the hearing on defendant's motion for a new trial, Underwood testified that he lived in an apartment across the hall from defendant with Sarah Bissell who had testified on defendant's behalf. At the hearing on defendant's motion for a new trial, Underwood testified that he had seen the complainant going into defendant's apartment several weeks before the incident at issue here. He testified that he had seen them holding hands as they went up the stairs to the apartment. Defendant's trial counsel indicated that he had interviewed Underwood, but did not indicate why he failed to call him as a witness.

Again, however, we note that decisions regarding whether to call or question a witness are presumed to be matters of trial strategy. *Rockey*, *supra* at 76. Here, defense counsel may have believed that because of Underwood's friendship with defendant that his testimony that the complainant had visited defendant's apartment on a previous occasion while defendant's wife was still living there would not have been credible. Accordingly, defendant's trial counsel may have decided to rely on Bissell's testimony to serve the purpose of establishing the possibility of a romantic relationship between defendant and the complainant. Moreover, because Bissell's testimony concerned a possible relationship between defendant and the complainant after defendant's wife moved out, defense counsel may have believed that her testimony fit in better with the story he was constructing for the jury, i.e., defendant could not have been with the complainant in July when she claimed because his wife likely would have been there and his work schedule would not have allowed it, but they did have a consensual sexual relationship after his wife moved out, which the complainant was trying to hide from her boyfriend by claiming defendant raped her. Considering the foregoing, we conclude that defendant has failed to overcome the presumption that his trial attorney's decision not to call Underwood as a witness was sound trial strategy when the decision was made. *Knapp*, *supra* at 385-386.

Defendant also asserts that his counsel was ineffective because he failed to investigate the case and locate Deborah Millard who also could have testified to a romantic relationship between defendant and the complainant. At the hearing on defendant's new trial motion, Millard testified that she had seen defendant and the complainant together on two separate occasions.

Defendant's trial counsel indicated that he was not aware of Millard prior to trial, and that defendant told him that no one else knew about his relationship with the complainant.

"Failure to make a reasonable investigation can constitute ineffective assistance of counsel." *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). However, in this case, defendant has not shown that the investigation undertaken by his trial counsel was unreasonable. Defense counsel inquired of defendant whether anyone else knew of a romantic relationship between the complainant and he, and defendant indicated that he was not aware of anyone else who had knowledge of that information. Millard did not work at the same location as defendant and Gale. Rather, she worked at a different medical facility where defendant apparently also worked. We do not believe that defendant's trial counsel was required to interview every person defendant had ever worked with on the off-chance someone might have seen defendant and the complainant together, when defendant himself indicated that he was unaware that someone else knew of his relationship with her. Moreover, because defendant's trial counsel had already located a witness who he used at trial to establish a romantic relationship between defendant and the complainant, we conclude that there is no reasonable probability that if Millard had been called as a witness that the result of the proceedings would have been different. Accordingly, defendant's claim of ineffective assistance of counsel on this basis must fail. *Rodgers*, *supra* at 714.

Defendant also asserts that his trial counsel was ineffective because he failed to introduce a videotape of defendant's initial conversation with the police and admitted that defendant had sexual intercourse with the complainant. Defense counsel testified that he factored his belief that the prosecution would use the videotape into his trial strategy, and that he considered the tape to be very prejudicial because on the tape defendant at first denied knowing the complainant, then admitted knowing her but denied they had a relationship, and then admitted to having sex with the complainant but claimed the sex was consensual. Thus, according to defense counsel, he made statements in his opening remarks to try to counter what was in the tape including the admission of consensual sex.

"A court cannot conclude that effective assistance of counsel is denied merely because a certain trial strategy backfired." *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). Decisions regarding what evidence to present are presumed to be matters of trial strategy that this Court "will not second-guess with the benefit of hindsight." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Further, conceding certain points at trial does not necessarily constitute ineffective assistance of counsel. Rather, "it is only a complete concession of defendant's guilt which constitutes ineffective assistance of counsel." *People v Krysztopaniec*, 170 Mich App 588, 596; 429 NW2d 828 (1988).

In this case, defendant has not shown that his trial counsel's decision to not introduce the videotape was unsound trial strategy. According to defendant's counsel, the tape cast defendant in a poor light and made him appear evasive and untruthful. While in reliance on his belief that the prosecution would introduce the videotape, defendant's trial counsel may have made statements to the jury during his opening remarks that were not fully supported by the evidence presented at trial. But defendant has not shown that leaving those statements unsupported was a worse strategy than introducing the videotape would have been. Defense counsel's strategy cannot be second-guessed simply because it failed. Because defendant has not shown that there is a reasonable probability that if the videotape had been introduced the result of the proceedings

would have been different, his argument that he was denied effective assistance of counsel on this basis fails. *Rodgers*, *supra* at 714.

Finally, defendant asserts that his counsel was ineffective because he refused to allow defendant to testify. Criminal defendants have a constitutional right to testify. *People v Simmons*, 140 Mich App 681, 683-684; 364 NW2d 783 (1985). However, defendant has failed to present any evidence that his counsel deprived him of that right. At the hearing on defendant's motion for a new trial, defendant's trial counsel testified that as the trial continued he felt "that the jury was looking unfavorably upon my client. And I chose not to put him on the stand at that point." Defense counsel's testimony on the subject does not indicate that defendant disagreed with or objected to this decision. Defendant himself did not testify during the hearing on his motion for a new trial. There is no indication in the record that defendant objected to his counsel's decision that it would be better for defendant not to testify. Defendant's apparent acquiescence to his defense counsel's decision to not have him testify constitutes a waiver of his right to testify. *Id*. at 685. Accordingly, defendant has also failed to establish ineffective assistance of counsel on this basis.

Affirmed.

/s/ William C. Whitbeck
/s/ William B. Murphy