STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 2, 2010
v	No. 287085 Shiawassee Circuit Court
STEVEN LOY LOCKWOOD, Defendant-Appellant.	LC No. 08-006622-FH

Before: Cavanagh, P.J., and Fitzgerald and Shapiro, JJ.

PER CURIAM.

A jury convicted defendant of third-degree criminal sexual conduct, MCL 750.520d(1)(c) (person incapacitated), and the trial court sentenced defendant to a prison term of 51 months to 15 years. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court abused its discretion in allowing the prosecution to amend the witness list before trial. "A trial court's decision to permit or deny the late endorsement of a witness is reviewed for an abuse of discretion." *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

MCL 767.40a(3) mandates that a prosecuting attorney provide to a defendant, not less than 30 days before trial, a list of the witnesses the prosecutor intends to call at trial. MCL 767.40a(4) then allows the prosecutor to "add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown."

Here, the trial prosecutor became aware of the existence of the two witnesses, Steven Palmer and Tia Bussa,[1] on April 4, 2008, and moved to endorse them on the witness list that same day. Trial was scheduled to commence on April 29, 2008. The trial court granted the motion in a hearing held on April 21, 2008. Given that the prosecutor had no actual knowledge of Palmer and Bussa when the witness list was originally compiled and submitted, the prosecutor

[1] Palmer and Bussa were to testify regarding a statement made by defendant months after the rape: "If your ma' wasn't such a ho' people wouldn't try raping her." Bussa never testified.

had good cause to move for the late endorsement. Thus, the trial court did not abuse its discretion.

Moreover, regardless of whether the prosecution had good cause, a defendant must show that he was unfairly prejudiced to be entitled to any relief. *People v Callon*, 256 Mich App 312, 328; 662 NW2d 501 (2003). But here, defendant failed to make such a showing. Defendant claims that he was prejudiced because the testimony was damaging. However, defendant mischaracterizes the type of prejudice required. *All* evidence is prejudicial or damaging to one side or the other at trial. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995). Only *unfair* prejudice is considered in the circumstance of permitting a late endorsement. *Callon*, *supra* at 328. Typically, this prejudice consists of defense counsel not being able to adequately prepare for the witness's cross-examination. E.g., *People v Burwick*, 450 Mich 281, 296; 537 NW2d 813 (1995). Here, defendant had eight days after the trial court's ruling (and 25 days after being initially notified by the motion filing) to interview the new witnesses.[2] To aid defense counsel, the trial court granted the motion on the condition that the prosecution assist in making the added witnesses available to defendant for interview before the start of trial. At the time, defense counsel's request for a continuance was denied, and defense counsel stated, "[I]f we get to the end of the week and I feel that I'm not prepared[,] I will bring a motion before the Court at that point." Defense counsel never brought such a motion. Therefore, we conclude that defense counsel did have adequate time to prepare in advance of trial, and defendant was not unfairly prejudiced by the late endorsement.

Defendant also argues that the rape victim's testimony recounting the statement allegedly made by defendant to Palmer was inadmissible hearsay (because she did not actually hear defendant make the statement) and that the statement, whether relayed by Palmer or the victim, should have been excluded as being more unfairly prejudicial than probative under MRE 403. However, the very same statement was properly admitted in Palmer's testimony. Thus, if there was any error in admission of the victim's recounting of what Palmer told her, it was harmless.

Defendant next argues that he was denied the effective assistance of counsel when his trial counsel failed to object to certain comments made by the prosecutor. Defendants have the guaranteed right to the effective assistance of counsel. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Aceval*, 282 Mich App 379, 386; 764 NW2d 285 (2009). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Generally, to establish an ineffective assistance of counsel claim, a defendant must show that (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Davenport*, 280 Mich App 464, 468; 760 NW2d 743 (2008).

Defendant first asserts that his trial counsel was ineffective by not objecting to the prosecutor's remark during closing arguments that defendant "admitted" to the rape. A

[2] We note that defendant was an acquaintance of Palmer and knew where Palmer lived.

prosecutor's remarks are evaluated in the context of the evidence presented and in light of defense arguments. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). "Although a prosecutor may not make a statement of fact to the jury that is unsupported by the evidence, he or she is free to argue the evidence and all reasonable inferences arising from it as they relate to the prosecution's theory of the case." *People v Schumacher*, 276 Mich App 165, 178-179; 740 NW2d 534 (2007). The test is whether a defendant was denied a fair and impartial trial due to the actions of the prosecutor. *Rodriguez*, *supra* at 30.

Defendant takes exception to the following comment during the prosecutor's closing argument:

> Let me just start with . . . this quote: "If your mother wasn't such a whore[,] people wouldn't try to rape her." He admitted it. He admitted it.

Here, the prosecutor was not making any statements of fact that were unsupported by the record; instead, she was arguing that defendant's statement could be interpreted as an admission to the rape. The fact that the statement could have been interpreted simply as a mean-spirited comment, and not an admission of guilt, does not somehow make the prosecutor's argument invalid or improper. It is important to note that the prosecutor did not alter defendant's statement or conceal it from the jury during closing arguments. The prosecutor quoted the actual statement and then argued what she thought it meant. This comment was not improper, and counsel's failure to make a meritless objection does not constitute ineffective assistance of counsel. *People v Horn*, 279 Mich App 31, 39-40; 755 NW2d 212 (2008).

Defendant also asserts that his trial counsel should have objected to prosecutorial comments that impermissibly bolstered the credibility of the victim and likewise impugned the credibility of defendant. We disagree.

A prosecutor may not vouch for the credibility of witnesses by implying she has some special knowledge of the witnesses' truthfulness. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). "A prosecutor may, however, argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief." *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Here, the prosecutor simply stated during closing arguments that there was nothing in the facts that would suggest any reason for the victim to have fabricated the accusation.[3] The prosecutor's arguments did not imply any special knowledge unknown to the jury.

[3] "Now think about it. If [the victim is] this liar it just doesn't fit. They're all getting along great and playing cards, and this is her boyfriend's little brother, and there's nothing wrong, no fights, no argument, and Defense wants you to believe that she somehow went and just came up with this hairbrain idea that he did this to her, to put herself through all this! For what? For what even remote plausible reason would she go in and all of a sudden come up with this story? She didn't. They all say she went in in a fine mood, presumably not feeling well, presumably needs to lay down. Comes out upset. They know her, they say, 'What's wrong? What's wrong?' She did not come through the door screaming rape. She's clearly upset. They have to pry it out of her. Think about it. This is reasonable. . . ."

Likewise, defendant's argument regarding the prosecutor's comments on defendant's credibility is not persuasive. The prosecutor stated during closing arguments that defendant "had every reason in the world to lie" to the police regarding how he injured his eye. Defendant told the police that the victim, out of the blue and for no reason, sucker-punched him while he was sleeping. The prosecutor was arguing to the jury why defendant's version of how his eye became injured differed from that of other witnesses who stated that the victim's boyfriend fought with defendant after learning of the rape. This was a permissible argument, based on the facts in evidence, that defendant was not credible. Accordingly, defendant was not denied the effective assistance of counsel by trial counsel failing to make a futile objection. *Horn*, *supra* at 39-40.

Defendant next argues that the trial judge's refusal to grant a continuance violated his constitutional right to the effective assistance of counsel. We disagree.

Typically, a trial court's decision whether to grant a continuance is reviewed for an abuse of discretion. *People v Jackson*, 467 Mich 272, 276; 650 NW2d 665 (2002). A trial court abuses its discretion when its denial of a continuance results in a "constitutional violation only when there is an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay." *Beuke v Houk*, 537 F3d 618, 641 (CA 6, 2008) (internal quotations omitted, citing *Morris v Slappy*, 461 US 1, 11-12; 103 S Ct 1610; 75 L Ed 2d 610 (1983)); see also *People v Mitchell*, 454 Mich 145, 159; 560 NW2d 600 (1997). In addition, in order to prevail, a defendant must also establish that the denial of the continuance actually caused prejudice. *Foley v Parker*, 488 F3d 377, 389 (CA 6, 2007); *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000). Defendant has failed to establish either.

First, defendant failed to show how the trial court abused its discretion by employing "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay." Eight days before trial, the trial court denied the request for a continuance. The court stated that it was denying the request with the understanding that (1) the endorsed witnesses would be made available to defendant for interview before trial and (2) all other items, such as medical records, were to be handed over by the prosecutor to defendant that very same day. It also appears that the trial judge thought the eight days should be enough for defense counsel to prepare for this new evidence in advance of trial. A reading of the record reveals that the trial judge thought an adjournment at that time would simply have been premature. In fact, both the trial judge and defense counsel indicated that if it *later* became apparent that defense counsel truly required more time to prepare, then a continuance would be granted *at that time*:

> *[Defense Counsel:]* I understand the Court is not willing to [grant the continuance] and has instructed me to continue preparing this week. Obviously, if we get to the end of the week and I feel that I'm not prepared I will bring a motion before the Court at that point.
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> *[The Court:]* Okay. . . .
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> *[The Court:]* So, as I indicated in chambers, if there is any problem you can let me know and we will take it up as that may present itself.

The trial court's deliberative process cannot be categorized as unreasonable or arbitrary. Rather, it appears to be a very reasoned approach to defendant's particular situation. The decision of the trial court to proceed as scheduled, with the caveat that the issue would be revisited if defense counsel later indicated more time was needed, was reasonable and principled and not an abuse of discretion.

Second, defendant failed to show how he was prejudiced by the trial court's refusal to grant the continuance. As noted, *supra*, defense counsel indicated that he would inform the trial court, closer to trial, if additional preparation time was necessary. No such notification was made. Therefore, it is apparent that defense counsel thought he had adequate time to prepare. Moreover, defendant cannot identify, with any particularity, how he was prejudiced. Defendant relies on the generalization that defense counsel was not able to "adequately investigate," which prevented him from "interview[ing] witnesses and pursu[ing] exculpatory evidence." Defendant, however, does not say what defense counsel would have uncovered with any additional time. Therefore, defendant failed to show any prejudice resulting from the trial court's denial of the request for a continuance, and his claim fails.

Defendant next argues that the prosecution violated his constitutional rights by suppressing evidence that it had a duty to disclose. We disagree.

"A criminal defendant has a due process right to obtain exculpatory evidence possessed by the prosecutor if it would raise a reasonable doubt about defendant's guilt." *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005); see also *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). However, defendant does not merely contend that his and the victim's clothing collected by the police should have been turned over to defendant – defendant asserts that the clothing should have been submitted for DNA testing. While exculpatory evidence needs to be disclosed, the duty does not extend to seeking out and finding exculpatory evidence. *People v Sawyer*, 222 Mich App 1, 5; 564 NW2d 62 (1997). Therefore, any aspect of defendant's argument requiring the police to have performed DNA testing fails.

Even if defendant's argument is viewed as requiring the prosecution to have handed over the untested clothes, the argument is equally unpersuasive. In order to establish such a due process violation, defendant must prove the following four elements:

> (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*Cox*, *supra* at 448.]

The first obstacle defendant is facing is that the exculpatory value of the clothes is unknown. Defendant has failed to meet the threshold requirement of showing that there was evidence "favorable to the defendant."

Assuming that the clothes contained no stains and were considered "favorable to defendant," defendant failed to satisfy the second element, showing that he could not have acquired the evidence with reasonable diligence. Due process is only implicated when the

government fails to disclose information of which the defendant is unaware. *Carter v Bell*, 218 F3d 581, 601 (CA 6, 2000); see also *Coe v Bell*, 161 F3d 320, 344 (CA 6, 1998) ("There is no *Brady* violation where a defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory information . . . ." (internal quotations omitted)). Here, defendant *knew* that the police confiscated his clothes. Yet, there is nothing in the record to show that defendant requested the evidence, nor that the exercise of reasonable diligence would have been unsuccessful in obtaining the clothes.

More problematic for defendant is that he cannot meet the last element, showing, had the clothes been turned over, that there was a reasonable probability that the outcome of the trial would have been different. Kathy Fox, from the Michigan State Police Crime Lab, testified that, while she never received any clothes to test, she examined all of the components of the "rape kit" and found no biological substances whatsoever. The prosecutor explained, during closing arguments, that there would be no signs of DNA anywhere because the victim was able to get defendant off of her before he was able to ejaculate. Hence, the jury was already working with the premise that there was no DNA or other biological evidence to be found. Thus, having clothes introduced with no biological evidence would not have affected that premise.

Furthermore, defendant's lie to Deputy Terry would have made it doubtful that a jury would reach a different verdict. The jury was confronted with the conflicting statement of defendant, who told Deputy Terry that the victim sucker-punched him while he was sleeping, and the testimony of the other witnesses, who saw the victim's boyfriend punch defendant after Jason learned of the rape. Given defendant's inconsistent account of what happened, the jury probably inferred that defendant was attempting to conceal that the grounds for the punch, which was the rape, ever occurred. This evidence of guilt would have been very persuasive for a jury and, consequently, very difficult to overcome, let alone overcome by the introduction of DNA-free clothes that were consistent with the prosecution's theory.

Therefore, even if "clean" clothes were provided to defendant and admitted as evidence at trial, it would have been consistent with the prosecution's theory, and there was not a reasonable probability that the outcome of defendant's trial would have been any different.

Affirmed.

/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald
/s/ Douglas B. Shapiro