

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TENORA BAYSO BROOKS,

Defendant-Appellant.

UNPUBLISHED

August 17, 2010

No. 287948

Wayne Circuit Court

LC No. 07-012211-FH

Before: K. F. KELLY, P.J., and WILDER and GLEICHER, JJ.

PER CURIAM.

After a bench trial, defendant was convicted of third-degree criminal sexual conduct (CSC III), MCL 750.520b(1)(b) and was sentenced to 2 to 15 years' imprisonment. He appeals as of right. We affirm.

I. BASIC FACTS

On the evening of January 26, 2007, the victim went to a bar alone and met defendant. The victim knew defendant and considered him a friend. The two played pool and danced. Later in the evening, they returned to defendant's apartment and defendant forced the victim to have sex with him. After the encounter ended, the victim left defendant's apartment and immediately reported the incident to police. Defendant was eventually arrested and charged with CSC III. Defendant's theory at trial was that the encounter was consensual. He contended that he had offered the victim \$200 for sex and that she had insisted instead on receiving \$250 after the sexual encounter. The trial court found the victim's version of events to be more credible and defendant was convicted. This appeal followed.

II. EVIDENTIARY DECISIONS

Defendant argues that the trial court made several erroneous evidentiary rulings. We review a trial court's evidentiary decisions for an abuse of discretion, *People v Starr*, 457 Mich 490, 491; 577 NW2d 673 (1998), and, to the extent that defendant asserts constitutional violations, our review is de novo, *People v McPherson*, 263 Mich App 124, 131; 687 NW2d 370 (2004). Further, because defendant did not specifically object on constitutional grounds below, reversal is not required unless defendant can show plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

A. MRE 609

Defendant first contends that the trial court erred by prohibiting the defendant from cross-examining the victim regarding her prior conviction for unlawful use of a motor vehicle. He asserts that the trial court abused its discretion by disallowing the evidence and also violated his right of confrontation under the Sixth Amendment.

In all criminal prosecutions, the accused has the right to be confronted with the witnesses testifying against him. US Const, Am VI; *People v Spangler*, 285 Mich App 136, 142; 774 NW2d 702 (2009). A key component of this right is the right to cross-examine those witnesses. *Davis v Alaska*, 415 US 308, 315; 94 S Ct 1105; 39 L Ed 2d 347 (1974). However, a defendant's right of confrontation is not without limitations; it protects the "opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v Fensterer*, 474 US 15, 20; 106 S Ct 292; 88 L Ed 2d 15 (1985) (emphasis in original). Judges "retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v Van Arsdall*, 475 US 673, 679; 106 S Ct 1431; 89 L Ed 2d 674 (1986); see also *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993).

Under MRE 609(a), evidence that a witness has been convicted of a crime may not be admitted for the purpose of attacking the credibility of a witness unless the evidence has been elicited from the witness or established by public record during cross-examination and (1) the crime contained an element of dishonesty or false statement, or (2) the crime contained an element of theft and (a) was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and (b) the court determines that the evidence has significant probative value on the issue of credibility. See *People v Parcha*, 227 Mich App 236, 241-242; 575 NW2d 316 (1997). The conviction of unlawful use of a motor vehicle can be used for impeachment under MRE 609(a) because it is a crime containing an element of theft and it was punishable by more than one year in prison. *People v Hayward*, 127 Mich App 50, 63; 338 NW2d 549 (1983).

Here, the trial court refused to admit evidence of the victim's 2006 conviction for unlawful use of a motor vehicle to impeach the victim's credibility. During trial, the following colloquy occurred during cross-examination of the victim:

Defense Counsel: Have you been convicted of any –

The Court: Counsel.

Defense Counsel: Prior felonies involving theft or dishonesty?

The Court: I – I don't like those questions. No, no, I don't care.

Defense Counsel: Your Honor, it goes to her credibility.

The Court: It doesn't go to anything. All it does is just makes the – discourages the witness from testifying. I don't believe that. I realize there are cases on that. But that's not going to make any difference. It's not going to make any difference at all. Those are silly lawyer rules that are used to influence the jury, it's not going to influence me at all.

* * *

Defense Counsel: It has to do with credibility.

The Court: Oh, I know it does. I know it does. It's just a silly rule that you can impeach a person who's been hold up [sic] for shoplifting but you can't impeach them if they raped or murdered somebody. That's just ridiculous. I personally don't think it's going to impeach anybody's credibility at all. All it does is embarrass the witness.

Although it is the prerogative of a trial court to determine whether a conviction is probative or not under MRE 609(a), the trial court here flat-out refused to learn what the conviction was. Without knowing the substance of the conviction, it was necessarily impossible for the trial court to determine whether its admission was probative of the victim's credibility. Thus, under the circumstances, the trial court violated defendant's right to confront the victim and abused its discretion by failing to properly apply MRE 609(a). Nonetheless, the error was harmless and defendant has failed to show that it affected his substantial rights. The trial judge indicated that he found past criminal convictions to have little probative value and that he would not give it any weight. Thus, even if the trial court knew the nature of the victim's criminal conviction, it still would have found defendant guilty of CSC III.

B. MRE 613

Defendant next argues that the trial court abused its discretion by refusing to admit the victim's medical records for impeachment purposes, in which the victim stated to a doctor that the assault occurred in a parking lot and not in defendant's apartment. We disagree.

Extrinsic evidence of a prior inconsistent statement for impeachment purposes may be admitted if "the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require." MRE 613(b); see *People v Malone*, 180 Mich App 347, 359; 447 NW2d 157 (1989). However, a trial court may refuse to admit extrinsic evidence for purposes of impeachment regarding collateral matters. *People v Wofford*, 196 Mich App 275, 281; 492 NW2d 747 (1992). Moreover, a trial court may exclude such evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *People v Blackston*, 481 Mich 451, 461; 751 NW2d 408 (2008).

Here, defense counsel attempted to introduce the medical records for purposes of impeaching the victim:

Defense Counsel: That [the victim] indicated that her history – physical history and the physical [sic] that the alleged rape had taken place in the car parking lot while she was going toward her car.

Prosecutor: Your Honor. I object to that.

The Court: I think – you asked the question about injury. And she said that there was none. If you wish to have it admitted for the purpose, the Court will accept that.

Defense Counsel: But also he stipulated to the history.

* * *

The Court: Well, she denied that and stated it happened. And the defendant said it happened in his apartment. The only difference is he is claiming that it was a contract and they both agree that it was at his apartment.

So I will admit it for that limited purpose. But not for any other purpose.

The trial court did not abuse its discretion by refusing to admit the medical records for purposes of impeaching the victim. Although the medical records were admissible under MRE 613(b) as extrinsic evidence of inconsistent statements, the evidence was merely cumulative. Defense counsel had already asked the victim during cross-examination about statements she had made to doctors that were recorded in her medical records. The victim denied making the statement that the assault had occurred in a parking lot. Therefore, the trial court was aware of the prior inconsistent statement and it did not abuse its discretion by refusing to admit the medical records for impeachment purposes because it was merely cumulative of the victim's testimony on cross-examination. Relief is not warranted on this basis.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant also asserts that he was denied the effective assistance of counsel because trial counsel failed to call two witnesses favorable to the defense. We disagree. Because defendant did not establish a testimonial record regarding his ineffective assistance of counsel claim, our review is limited to mistakes apparent on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). To prevail on a claim of ineffective assistance a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). Counsel's decision whether to call or question a witness is presumed to be a question of trial strategy and we will not substitute our judgment for the judgment of counsel regarding these matters. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant contends that trial counsel should have called (1) Dr. Andrew Kagel, the doctor who treated the victim following the assault and who would have testified that the victim told him she was sexually assaulted in a parking lot instead of in defendant's parking lot, and (2) defendant's friend, Kevin Washington, who would have testified that defendant and the victim had previously had a sexual relationship. The alleged failure to investigate these witnesses whose testimonies would have impeached the victim's credibility, however, did not amount to deficient performance. Our review of the record reveals that their testimonies would have been cumulative of impeachment evidence already in the record. The substance of Dr. Kagel's testimony was in the record in the form of defense counsel's cross-examination of the victim regarding the recorded statements in her medical records. As to Washington, testimony that the victim and defendant had a previous sexual relationship would be cumulative of the testimony defense counsel elicited from the victim on cross-examination that the victim had allegedly told police officers that she had previously dated defendant. Thus, defendant has failed to show that he was deprived of a substantial defense due to counsel's decision not to produce these witnesses. Rather, a review of the record reveals that counsel did raise the defense of consent during her direct examination of defendant and further bolstered that theory by attacking the victim's credibility and during closing argument. The failure to call a witness constitutes ineffective assistance of counsel only if it deprived the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Counsel's failure to do so here did not deprive defendant of a substantial defense.

Further, even if defense counsel's performance was deficient, no evidence in the lower court record indicates that there is a reasonable probability that the outcome would have been different. The issue in this case concerned whether defendant and the victim had consensual sex. The trial court determined that it believed the victim and not defendant because defendant told an unbelievable story about offering the victim money for sex, but refusing to pay her up-front. Conversely, the trial court found the victim's credibility to be strengthened by the fact that she immediately went to the police after the incident and appeared before them "crying hysterically." None of the new evidence that defendant claims should have been admitted would undermine the findings of the trial court, let alone create a reasonable probability of a different outcome. Defendant was not denied the effective assistance of counsel.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Kurtis T. Wilder
/s/ Elizabeth L. Gleicher