STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED February 21, 2013
v	No. 310039 Wayne Circuit Court
DEWAYNE RUFFIN, Defendant-Appellee.	LC No. 11-002374

Before: CAVANAGH, P.J., and SAWYER and SAAD, JJ.

PER CURIAM.

The prosecution appeals by leave granted an order granting defendant's motion for a new trial following his jury convictions of kidnapping-child enticement, MCL 750.350, and second-degree criminal sexual conduct, MCL 750.520c(1)(a). We reverse and remand for further proceedings consistent with this opinion.

On February 22, 2011, at about 2:00 p.m., the ten-year-old victim was walking to her father's house when defendant, who lived across the street, told her that she should be wearing a hat. The victim further testified that, as she continued to walk toward her father's house, defendant approached her, grabbed her right arm, and forcefully pulled her across the street to his house. Once they got to his house, defendant opened the screen door. But before the inner door was opened, the victim had "a feeling he was about to do something" so she "strength[ed] up and yanked away." She then ran toward her father's house. When she reached the driveway, believing she was safe, she started walking. While in the driveway of her father's house, defendant approached her from behind, grabbed her by both of her arms, turned her around to face him, and then "felt on my butt" with both of his hands.

The victim then ran to her father's house and, once inside, she told her sister about the incident. The victim's sister testified that the victim was shaking and crying when she described the incident, and seemed scared. The victim's sister then told her older sister, who testified that the victim appeared scared and was crying. An adult in the house was told about the incident and she called the victim's mother and the police. The victim's mother testified that, when she arrived at the house, the victim appeared scared and was crying. The next day, the victim complained about her right shoulder hurting. The following day, she was taken to the hospital because her mother thought the victim's shoulder was dislocated. The treating physician testified that his examination revealed "reproducible tenderness over the trapezius musculature

on the right side." This injury was consistent with the history that he had received—a "male attempted to pull her into a home by pulling on her right arm." When asked if it appeared that the victim was "making it up," the physician testified: "No. I believe that the history and the physical examination were compatible with having been assaulted."

At trial, defendant testified that, on the date at issue, he was alone in front of his house shoveling snow. At about 1:00 p.m., he saw the victim walking across the street. He told her she needed a hat. He had no other contact with her and did not see where she went. At about 2:30 p.m., after he finished shoveling the snow, defendant went into his house and fixed his disabled mother lunch. About 40 minutes later, he went back out to shovel snow at a corner store. Defendant testified that he finished shoveling at about 3:30, and returned home. He stayed home until about 6:00 p.m., and then "stepped back outside." When he returned home, he learned from his cousin that the police were looking for him. He did not ask any questions and did not know why the police were looking for him until the victim's stepmother or aunt came over at about 7:30 p.m. Defendant did not call the police or do anything "[b]ecause I know I hadn't did anything." Defendant also testified that he had never had any problems with the victim or her family.

The responding police officer, Matthew Fulgenzi, testified that he was the initial officer who responded to the police run at approximately 4:00 p.m. After his investigation, he went to defendant's house, but defendant was not home. He returned to the home at approximately 9:30 p.m. and arrested defendant. Defendant was charged with kidnapping-child enticement and second-degree criminal sexual conduct. The first trial on this matter resulted in a mistrial after the jury was unable to reach a unanimous verdict. The second jury trial resulted in convictions as charged.

Defendant then moved for a new trial, arguing that the jury verdict was against the great weight of the evidence. Defendant argued that the victim fabricated the entire incident and that her version of the alleged events was "inherently implausible" because "sexual assaults generally occur in one of two manners." Either the perpetrator "build[s] a relationship to the point where they feel confident the abuse won't be revealed" or they commit "a blitz attack where an individual grabs somebody off the street and assaults them with the hope of not getting caught." In the second case, defendant opined, the perpetrator would "do this in a manner so as not to be observed by third persons in an area where they are not known." Because the facts did not fit either method, defendant claimed, he was entitled to a new trial. Further, defendant argued, the jury did not deliberate very long before reaching its verdict; thus, "[i]t is clear that the jury failed to do a careful and conscientious examination of the facts or did [not] apply the law as given, specifically burden, presumption and guilt beyond a reasonable doubt." Accordingly, defendant argued, he was entitled to a new trial.

At the first hearing on defendant's motion, the trial court indicated that a letter from a juror was received which had raised certain concerns about the trial. After reading part of the letter into the record, the court stated that it was "just trying to make a record of jury's concerns in this letter." The court also referenced a concern the jury purportedly had when it was

"debriefed" by the court after the verdict.[1] Thereafter, the matter was set for rehearing so that the judge could "sleep on the matter."

At the second hearing, the trial court held that "a miscarriage of justice has presented in this matter" and defendant's motion for a new trial was granted. First, the court noted that the jury had deliberated about ten minutes before asking for an explanation regarding the different degrees of criminal sexual conduct "which itself indicates they did not either understand or pay attention to the instructions just given ten minutes before." And the jury deliberated "only fifty minutes prior to returning a verdict." Second, the court noted that "this was a jury of twelve Caucasian white folks passing judgment on [defendant], an African American," but defense counsel "did not raise any issues related to that." Third, the court opined that defendant "was poorly represented as it related to the cross-examination of [defendant]." In that regard, the court referenced the fact that the jury was never told why defendant's mother did not testify and questioned: "How come she didn't come testify as it relates to [defendant] dragging the young lady into his house with his mother there in the room?" The trial court concluded that, although it was not considering the concerns set forth in the juror's letter, defendant "didn't get a fair shake because of deficient performance of counsel. And for those reasons the Court will grant the motion for a new trial."

The prosecutor then inquired as to which *Lemmon*[2] factors the court found warranted a new trial. The trial court responded as follows:

> Well, first of all, there is the factor of the testimony contradicts indisputable physical facts or laws. The testimony is patently incredible. The witness' testimony is implausible, and it has been seriously impeached.
>
> [Defense counsel] makes the comment correctly related to those factors that the acts of these nature are committed by individuals with excess [sic] who build a relationship to the point where they feel confident the abuse won't be revealed, such as family members, little league coaches, Sunday school teachers.
>
> The other method is your garden variety jump from the bushes blitz attack when an individual grabs somebody off the streets and assaults them with the hope of not getting caught and this is done in a manner so as not to be observed by third persons in an area where they're not known. And the facts of this case don't fit either method.

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[1] It is well-established that, generally, a jury member may not impeach the jury verdict. See MRE 606(b); *People v Budzyn*, 456 Mich 77, 91; 566 NW2d 229 (1997); *People v Fletcher*, 260 Mich App 531, 539-540; 679 NW2d 127 (2004). Thus, the trial court's consideration of a jury member's "concerns" set forth in a letter and of a jury concern expressed upon "debriefing," was misguided and inappropriate.

[2] *People v Lemmon*, 456 Mich 625, 645-646; 576 NW2d 129 (1998).

> [Defendant] and [a character witness] testified that they knew one another, where each resided. And on that basis and for the reasons brought out in testimony at trial the Court believes that the Lemon [sic] factors have been met.

Thereafter, an order was entered consistent with the trial court's ruling. This appeal followed.

The prosecution argues that the trial court abused its discretion in granting defendant a new trial because the reasons given in support of the decision were inadequate, unsupported by the record, or not legally recognized. We agree.

MCR 6.431 provides for the filing of a motion for new trial by a criminal defendant and further states that, on such motion, the trial court "may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice." MCR 6.431(B). In this case, defendant filed a motion for new trial and argued that the jury verdict was against the great weight of the evidence. The test under such a challenge "is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001).

In granting defendant's motion, the trial court held that "a miscarriage of justice has presented in this matter." The trial court considered the jury's deliberative behavior and all-white composition, as well as defense counsel's "deficient performance" for failing to challenge the jury array and effectively cross-examine defendant regarding the absence of his mother at trial. The court concluded that, for these reasons, defendant was entitled to a new trial.

However, defendant's motion for a new trial was largely premised on a challenge to the victim's credibility. Defendant argued that the verdict was against the great weight of the evidence because the victim's testimony was "inherently implausible." Accordingly, after the trial court's initial ruling, the prosecutor queried the trial court regarding whether any test for disturbing the jury's evaluation of the victim's credibility set forth in *Lemmon* was met. The trial court responded in the affirmative, holding that the victim's testimony "contradicts indisputable physical facts or laws," was "patently incredible," "implausible," and was "seriously impeached." Thus, we consider the entirety of the trial court's conclusions which led it to grant defendant a new trial.

A trial court's decision to grant a new trial is reviewed for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). An abuse of discretion occurs when the result is outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). The trial court's factual findings are reviewed for clear error, while questions of law are reviewed de novo. *People v Terrell*, 289 Mich App 553, 559; 797 NW2d 684 (2010). In determining whether the trial court abused its discretion in granting a new trial, we must examine the trial court's reasons. An abuse of discretion occurred if the reasons given in support of the decision are inadequate or not legally recognized. See *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999); *People v Bart (On Remand)*, 220 Mich App 1, 15; 558 NW2d 449 (1996). Thus, we first turn to the trial court's concerns related to the deliberative behavior of the jury.

The trial court noted that, ten minutes after receiving their instructions, the jury asked about the different degrees of criminal sexual conduct "which itself indicates they did not either understand or pay attention to the instructions." And, the court noted, the jury deliberated "only fifty minutes prior to returning a verdict." We have reviewed the record. The jury was excused for deliberations at 11:19 a.m. The jury returned to the courtroom for additional instruction regarding character evidence at 11:25 a.m. At 11:27 a.m., the jury was again excused for deliberations, but was not provided a copy of the jury instructions. After the jury sent a note asking the difference between the degrees of criminal sexual conduct, the jury returned to the courtroom at 12:16 p.m. and was advised that the different degrees were irrelevant and to focus on criminal sexual conduct in the second degree. Then the jury was excused for lunch until 1:30 p.m., and was told that a copy of the written instructions would be provided after lunch. At 2:30 p.m., after sending a note that a verdict had been reached, the jury returned to the courtroom, the foreperson declared the guilty verdicts, and the jury was polled.

The record does not support the trial court's findings that the jury asked their single question ten minutes after receiving their instructions and rendered their verdict after only fifty minutes of deliberation. See *Terrell*, 289 Mich App at 559. But even if the trial court's findings were accurate, they would not support a conclusion that the verdict constituted a miscarriage of justice. The fact that the jury asked a single question does not reasonably lead to the speculative conclusion that the jury "did not either understand or pay attention to the instructions." Nor does such an inquiry overcome the strong presumption that jurors follow the instructions of the court. See, e.g., *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Further, the length of time the jury takes to deliberate, even if short in duration, "does not mean the verdict was not the product of considered judgment and due deliberation." *Haidy v Szandzik*, 46 Mich App 552, 555-556; 208 NW2d 559 (1973). And we could find no legal support for the trial court's conclusion to the contrary. Accordingly, the trial court's decision to grant defendant a new trial premised on the deliberative behavior of the jury constituted an abuse of discretion. See *Jones*, 236 Mich App at 404.

Next, the trial court considered the fact that defendant, an African American, was convicted by an all-white jury. It appears that the trial court held that defense counsel was ineffective for failing to object to the composition of the jury. A defendant has the right to effective assistance of counsel. *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). Ineffective assistance is shown when (1) counsel's performance was below an objective standard of reasonableness, (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) the result that did occur was fundamentally unfair or unreliable. See *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012).

While a criminal defendant is entitled to a fair and impartial jury drawn from a fair cross section of the community, there is no guarantee that a particular jury will "mirror the community." *People v Smith*, 463 Mich 199, 214; 615 NW2d 1 (2000) (Cavanagh, J) (citation omitted). To establish a violation of the fair cross-section requirement, a defendant must prove "that a distinctive group was underrepresented in his venire or jury pool, and that the underrepresentation was the result of systematic exclusion of the group from the jury selection process." *Id*. at 203.

In this case, there is nothing in the record to suggest the absence of African Americans in the jury pool, or that the absence of any African American on the jury or in the jury pool was the result of systematic exclusion. And the trial court did not support its holding with any such factual findings. Further, during voir dire, the trial court asked the potential jurors whether there was any reason they could not be fair and impartial and all replied in the negative. There was also no evidence of racial prejudice. Accordingly, defense counsel had no obligation to raise a meritless objection challenging the fact that defendant's jury was composed of all white jurors. See *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000). Accordingly, the trial court's decision to grant defendant a new trial premised on the ground that defense counsel was ineffective for failing to object to the composition of the jury constituted an abuse of discretion. See *Jones*, 236 Mich App at 404.

Next, the trial court concluded that defendant was deprived the effective assistance of counsel because his attorney did not cross-examine defendant regarding the absence of his mother at the trial. In that regard, the trial court specifically questioned: "How come she didn't come testify as it relates to [defendant] dragging the young lady into his house with his mother there in the room?" However, the cross-examination of witnesses is presumed to be a matter of trial strategy. *In re Ayres*, 239 Mich App 8, 23; 608 NW2d 132 (1999); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). And it is well-established that counsel should not be second-guessed on matters of trial strategy, nor should counsel's competence be assessed with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

In this case, defense counsel's failure to cross-examine defendant regarding his mother's absence at the trial was neither deficient nor prejudicial. See *Lockett*, 295 Mich App at 187. First, contrary to the trial court's holding, the victim never testified that defendant dragged her into his house. She testified that defendant pulled her across the street to his house and, after he opened the screen door but before he opened the inner door, she was able to run away. The victim was never in defendant's house. Second, the victim never testified that she saw defendant's mother and there was no evidence that defendant's mother saw her or witnessed the incident. Defendant testified that (1) his mother was home, (2) she was completely physically disabled and confined to a wheelchair, (3) he had placed her in front of the television in the living room, and (4) she would be unable to move her wheelchair around the house. There was no evidence of defendant's mother's mental capacity and there was no evidence regarding the location of the living room in relation to the screen door. Under these circumstances, counsel's failure to cross-examine defendant as to why his mother did not appear as a witness at the trial was not objectively unreasonable or prejudicial. Accordingly, the trial court's decision to grant defendant a new trial premised on the ground that defense counsel was ineffective for failing to cross-examine defendant regarding his mother's absence at the trial constituted an abuse of discretion. See *Jones*, 236 Mich App at 404.

Finally, we consider the trial court's conclusion that defendant was entitled to a new trial because the victim's testimony "contradicts indisputable physical facts or laws," was "patently incredible," "implausible," and had been "seriously impeached." Borrowing from defendant's argument, the trial court opined that "acts of these nature" only happen in one of two ways, and "the facts in this case don't fit either method." However, these purported exclusive "methods"

for committing the charged crimes espoused by the trial court are not recognized in the governing statutes or in applicable law.

The kidnapping-child enticement statute, MCL 750.350, provides that it is unlawful to forcibly lead, take, or carry away any child under the age of 14 years, with the intent to detain or conceal the child from their parent or guardian. In this case, the ten-year-old victim testified that she was walking toward her father's house when defendant approached her, grabbed her by one of her arms, pulled her across the street toward his house, and then opened the screen door before the victim "yanked away" and ran. The victim's mother testified that the victim later complained that her "right shoulder had a knot on it" and, on examination, she noticed a "knot . . . sticking [out] of her shoulder." She thought her daughter's shoulder was dislocated. Medical treatment was sought, and the treating physician testified that his examination revealed "reproducible tenderness over the trapezius musculature on the right side." He diagnosed a muscle strain and indicated that a muscle spasm could cause a "knot," although "knot" is not a medical term. When asked, in his professional expert opinion, "did [the victim] appear to be making it up," the physician testified: "No. I believe that the history and the physical examination were compatible with having been assaulted."

The second-degree criminal sexual conduct statute, MCL 750.520c(1)(a), provides that it is unlawful to engage in sexual contact with a person under the age of thirteen. In this case, the ten-year-old victim testified that, after she was able to pull away from defendant, she ran toward her father's house. When she thought she was safe, she started walking. While in the driveway of her father's house, defendant approached her from behind, grabbed her by both of her arms, turned her around to face him, and then "felt on my butt" with both of his hands. Again, she ran away. Several witnesses testified that, while at her father's house after the incident, the victim was shaking, crying, and noticeably scared.

Defendant testified that, other than telling the victim that she needed a hat, he had no other contact with her and did not see where she went. He also testified that he had never had any problems with the victim or her family.

In *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998), the trial court granted the defendant a new trial after concluding that the two young victims of the charged criminal sexual assaults "lacked credibility." *Id*. at 632. The trial court noted that the victims' memories of the details were poor and their descriptions of the circumstances surrounding the sexual assaults were illogical. *Id*. Their demeanor was also "questionable." *Id*. Our Supreme Court reversed, holding that "a judge may not repudiate a jury verdict on the ground that he disbelieves the testimony of witnesses for the prevailing party." *Id*. at 636, quoting *People v Johnson*, 397 Mich 686, 687; 246 NW2d 836 (1976). The *Lemmon* Court reiterated the well-established tenet that "[i]t is the province of the jury to determine questions of fact and assess the credibility of witnesses." *Id*. at 637. The Court recognized, however, that the issue of credibility is implicit in determining the great weight of the evidence, but cautioned that new trial motions based solely on witness credibility are not favored. *Id*. at 638-639. The Court held that "absent exceptional circumstances, issues of witness credibility are for the jury, and the trial court may not substitute its view of the credibility for the constitutionally guaranteed jury determination thereof." *Id*. at 642, quoting *Sloan v Kramer-Orloff Co*, 371 Mich 403, 411; 124 NW2d 255 (1963). Thus, when considering "a question of the credibility of witnesses testifying to diametrically opposed

assertions of fact," the *Lemmon* Court concluded that "unless it can be said that directly contradictory testimony was so far impeached that it 'was deprived of all probative value or that the jury could not believe it,' or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination." *Id*. at 645-646, quoting *Sloan*, 371 Mich at 410, 412.

As in the *Lemmon* case, the question presented in this case was "one of credibility posed by diametrically opposed versions of the events in question." See *Lemmon*, 456 Mich at 646. And, as in *Lemmon*, there were no "exceptional circumstances" presented. The victim's testimony was not "so far impeached that it was deprived of all probative value" or was such "that the jury could not believe it." See *id*. Her testimony regarding the incident also did not contradict indisputable physical facts or defy physical realities. See *id*. Thus, as the *Lemmon* Court held, "the trial court was obligated 'despite any misgivings or inclinations to disagree,' to leave the test of credibility where statute, case law, common law, and the constitution repose it," in the jury, the trier of fact in this case. See *id*. at 646-647. Accordingly, the trial court's decision to grant defendant a new trial premised on the ground that the verdict was against the great weight of the evidence constituted an abuse of discretion. See *Jones*, 236 Mich App at 404.

In summary, the trial court abused its discretion when it granted defendant's motion for a new trial because the jury verdict did not result in a miscarriage of justice and was not against the great weight of the evidence.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Henry William Saad