STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY WITKOWSKI,

Defendant-Appellant.

UNPUBLISHED
May 7, 1996

No. 156532
LC No. 91-1555-FH

Before: MacKenzie, P.J., and White and M. W. LaBeau,* JJ.

PER CURIAM.

Defendant was charged with three counts of third degree criminal sexual conduct, MCL 750.520d(1)(b); MSA 28.788(4)(1)(b), arising out of an assault on his former girlfriend, the mother of his children. The jury convicted on count I, but was deadlocked as to the remaining counts. The prosecution dismissed the other counts and defendant was sentenced to 48 to 180 months' imprisonment. Defendant appeals as of right, asserting improper admission of expert testimony, improper jury instruction, ineffective assistance of counsel, failure to reread portions of testimony to the jury during deliberations, and prosecutorial misconduct. We affirm.

I.

Defendant and complainant began dating in 1985, while attending high school, and had their first child together in 1987. Despite a cooling in the relationship after the birth of the first child, their second child was born in 1988. After their second child was born, they stopped dating. Complainant moved from her parents' home in 1990 and into an apartment, where defendant periodically visited complainant and the children. Defendant testified that except for a six month period after the birth of their second child, he and complainant continued to see each other. Defendant described their relationship at the time complainant moved into the apartment as "very good friends." Defendant testified their sexual relationship continued throughout the entire six year period, even after they stopped dating.

* Circuit judge, sitting on the Court of Appeals by assignment.

Complainant testified that defendant yelled at her, threatened her and hit her throughout the relationship. She further testified that defendant beat her when she denied him sex or when he did not approve of the clothing she was wearing. She stated that because she was afraid of defendant, she did not tell anyone about this violence or seek treatment for her injuries. While acknowledging the couple argued, defendant denied ever striking complainant and stated that striking a woman was "intolerable." He further testified that he always asked complainant prior to initiating sex, he never used threats or other actions to persuade her to consent, and they never had sex without her consent.

Complainant testified that on June 21, 1991, the night of the incident, she spoke with defendant on the telephone, but did not invite him to her apartment. She testified that at approximately 11:00 p.m., defendant unexpectedly arrived at her apartment and, out of fear, she let him in. While their children slept upstairs, defendant and complainant sat in the living room watching television. Later, defendant put a pornographic video in the VCR and, while both of them lay on the floor, made sexual advances, including kissing complainant and touching her breasts. Complainant testified that after a minute or two she told defendant that she "didn't want to," and that defendant then punched her in the stomach.

Complainant testified that after she was hit, both she and defendant undressed themselves. She testified that she knew she had to undress and feared that defendant would further hurt her. At his request, she performed oral sex on him. They then had sexual intercourse, and defendant performed oral sex on her. She testified that she did not verbally refuse to perform oral sex on defendant and did not resist. During intercourse, she did not struggle or refuse, and defendant did not hold her down. Other than her initial refusal, she never said she did not want to have sexual relations. Afterwards, they watched television for a brief period and defendant left the apartment.

Defendant testified, giving a conflicting account. He stated that complainant called him and invited him to her apartment. Defendant borrowed his parents' car and while getting his keys found a pornographic video near his VCR, which he decided to bring with him. When defendant arrived at complainant's apartment approximately one half hour later, he left the video in the car. Complainant let defendant into her apartment and they talked while sitting on the floor. Defendant told complainant that he had the video in his car and complainant indicated she wanted to watch it. Defendant retrieved the video and put it in the VCR.

Defendant stated he kissed complainant for five to ten minutes. During this kissing activity, complainant consented to further sexual contact. Defendant removed his and complainant's pants, at which point they engaged in foreplay, but were interrupted by a phone call. After complainant completed the phone call, she performed oral sex on defendant. They then had sexual intercourse, and defendant performed oral sex on complainant. Defendant testified that after having sex, they ate ice cream and cookies, and talked about their current boyfriends and girlfriends.

Complainant did not report the incident to the police immediately after it occurred. Subsequent to the date of the incident, the police had several contacts with complainant. On June 23, 1991, complainant's neighbor, Cynthia Vandesteene, called in a complaint that defendant was knocking on complainant's door and walking around outside the apartment. Complainant, while talking to Vandesteene on the phone, was hiding in the apartment and did not want to answer the door. The police arrived and arrested defendant when they discovered he was carrying a knife. Regarding this incident, defendant testified that complainant gave him permission to come to her apartment and that he had become concerned when she failed to answer the door. He left and attempted to call complainant, but there was no answer. Defendant then went back to the apartment, and was waiting for complainant to return when the police arrived and arrested him.

The police responded to another call from Vandesteene on July 7, 1991. Complainant alleged that defendant had come to her apartment on July 5, 1991, threatened her regarding the June 21 charges, and hit her. Complainant, nonetheless, did not want to file a complaint. Defendant's then-current girlfriend, Angela Cassini, testified that defendant was with her watching fireworks on July 5, and that she was with him between 11:30 p.m. and 12:00 a.m. Defendant's sister testified that defendant was home when she arrived on the evening of July 5, 1991. She further testified that she saw defendant go to his room and that he could not have left the house without her knowing.

On July 10, 1991, police responded to another call from Vandesteene regarding a loud noise she had heard coming from complainant's apartment at approximately 12:00 a.m. The police knocked, but there was no answer. The police eventually entered with a key obtained from Vandesteene. Complainant was found curled in the fetal position on the floor and was unresponsive. After an initial denial, complainant indicated that defendant had been at her apartment regarding his legal problems. Defendant testified that he was with Cassini on the night of July 9 to July 10. Cassini testified that defendant spent the night of July 9, 1991 at her home..

Vandesteene testified that complainant was very quiet and reluctant to talk about the incidents. Complainant would not disclose specifics but stated that it had to do with defendant. After prompting from Vandesteene, Vandesteene inferred that the problem had something to do with sex. Detective Palazzola testified that he interviewed complainant after the June 23 incident, but she was introverted and made no allegations of sexual assault.

At the behest of Palazzola, complainant went to the police station on July 11, 1991. She met with a counselor for over an hour, and with Palazzola afterward. In her conversation with Palazzola, complainant alleged that defendant had sexually assaulted her on June 21, 1991. Defendant was subsequently interviewed and arrested.

II.

Defendant first argues that the trial court erred in admitting expert testimony on the battered woman syndrome, and as a result, he was denied a fair trial. Defendant asserts (1) lack of foundation for admission of the testimony, (2) the testimony was substantially more prejudicial than probative, and (3) the expert's testimony exceeded the limitation established by the trial court.

In a case similar to the instant case, *People v Christel*, 449 Mich 578; 537 NW2d 194 (1995), the court addressed the admissibility of expert testimony regarding the battered woman syndrome. The defendant and the complainant in *Christel* had an on-again, off-again relationship, which later progressed in physical abuse. At trial, the complainant in *Christel* was portrayed as a liar and a self-mutilator, and defense counsel brought out instances where the complainant had injured herself to get the defendant's attention. The defendant's theory was that the complainant pursued the rape charge against the defendant in retaliation. To rebut these claims and to bolster the complainant's credibility with the jury, the prosecution called Dr. Lewis Okun, a clinical psychologist, who testified regarding the battered woman syndrome. Because Dr. Okun had never treated the complainant or the defendant, Dr. Okun's testimony was limited to generalities associated with the syndrome. *Id.* at 585. On appeal, the Court held that expert testimony regarding the battered woman syndrome is admissible only when it is relevant and helpful to the jury in evaluating a complainant's credibility and the expert witness is properly qualified. As a caveat, the Court noted that the expert may not opine whether the complainant is a battered woman, may not testify that defendant is a batterer or is guilty, and may not comment on the complainant's truthfulness. *Id*. at 580.

In the instant case, defendant depicted complainant as being a liar who was seeking attention from defendant by any means, even by false allegations of rape. Stressing the lapse of time between the alleged abuse and the time of the report to the police, in addition to complainant's unwillingness to talk to the police, defendant attacked complainant's credibility. To counteract this attack, the prosecution called Dr. Okun to testify regarding the general nature of the battered woman syndrome, i.e., the failure to report incidents of abuse, and the willingness of the woman to stay in an abusive relationship. Dr. Okun did not testify as to either complainant or defendant, as he had not treated either prior to testifying. Dr. Okun's testimony was confined to the generalities of the syndrome. We conclude, therefore, that the testimony was proper under *Christel, supra*.

For the first time on appeal, defendant argues a lack of foundation for the admission of testimony relating to the battered woman syndrome because there was insufficient evidence that defendant had habitually physically abused complainant.[1] An objection to evidence on one ground at trial does not preserve for appeal an objection to the same evidence on another ground. MRE 103(a)(1); *People v Hoffman*, 205 Mich App 1; 518 NW2d 817 (1994). As defendant failed to object on this basis at trial, this Court will not address the issue absent manifest injustice. We find no manifest injustice. Further, the decision whether sufficient foundation has been laid for the admission of evidence is left to the discretion of the trial court. *People v Schwab*, 173 Mich App 101, 103; 433 NW2d 824 (1988). We conclude that the trial court did not abuse its discretion in finding that there was adequate foundation for the testimony. And, while the trial court may exclude certain testimony where

the probative value of the syndrome evidence is substantially outweighed by the danger of unfair prejudice, MRE 403; *Christel, supra*, such was not the case here. We also reject defendant's contention that the prosecutor violated the trial court's ruling on the permissible scope of the expert testimony in posing an improper question to the witness. Defendant did not object to this question. Further, we conclude that any error was harmless, as the jury was aware that the case dealt with the battered woman syndrome at the time the question was asked.

III.

Defendant next asserts error in the instruction given to the jury on third degree criminal sexual conduct. Defendant objected to the instruction at trial on the ground that it failed to communicate to the jury the actor's state of mind. Defendant later proposed a specific instruction, which was accepted by the prosecutor and given by the court. On appeal, defendant argues error on different grounds, asserting that the instruction allows for conviction on lesser proofs than required by the statute, MCL 750.520d(1)(b); MSA 28.788(4)(1)(b). Again, we conclude that defendant failed to preserve the issue for appeal, and accordingly will not reverse unless the instructions as a whole failed to adequately apprise the jury of the elements of the offense. We conclude the instructions were adequate.

IV.

Defendant next argues that he was denied the effective assistance of counsel when his attorney failed to question complainant about a prior false allegation of rape, despite the fact that complainant was recalled as a witness expressly for this purpose.

In order to succeed on a claim of ineffective assistance of counsel, a defendant must first show that counsel's performance was below an objective standard of reasonableness. Second, the defendant must demonstrate prejudice by showing that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Pickens*, 446 Mich 298, 303, 314; 521 NW2d 797 (1994). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 314. In assessing defense counsel's performance, we will not second-guess with hindsight the decision of counsel, especially with regard to trial strategy and tactics. *Id.* at 330. Defendant must overcome a strong presumption that counsel's assistance constituted trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

During the prosecution's case-in-chief, defense counsel attempted to cross examine Dr. Okun on the occurrence of false claims of domestic violence. The prosecution objected, and defense counsel argued that he would establish a foundation through the testimony of complainant's father, against whom a false allegation of rape was made by complainant. The court ruled that allowing the father to testify as to the allegation of rape would be impeachment of the complainant on a collateral matter[2] and that the only way defendant could raise the issue was on cross-examination of the complainant. As complainant had already testified, the court permitted defense counsel to recall complainant in order to lay the

foundation for the admission of the evidence. Apparently assuming that such a foundation would be established, the court permitted defense counsel to cross-examine Dr. Okun regarding false charges. Later, defense counsel recalled complainant and questioned her as follows:

Q. It's a period of time, oh, after you had known Gregory for say three or four months, and to make it more specific, that you told Gregory that your father had made you pregnant; is that true?

A. I don't remember .

Q. You don't remember telling Gregory that?

A. No.

THE COURT: What did you say, ma'am?

THE WITNESS: I don't remember.

Q. Isn't it true that you told Mrs. Witkowski, Maddie Witkowski, Gregory's mother, that your father had sex with you and made you pregnant?

A. I'm not sure what I told them.

Q. You don't remember?

A. No.

THE COURT: She said she's not sure what she told them.
[*Defense Counsel]*: Okay.

Q. Is it possible that you told them that?

A. I don't know.

Q. Were you indeed made pregnant by your father?

[Prosecutor]: Objection. Objection, your Honor. The Court had a ruling as to what the question can be asked. May I approach the side bar?

(At about 11:18 A.M. – Conference at bench off record between Court and counsel.)

[By Defense Counsel]

Q. Do you recall Maddie Witkowski, Gregory's mother, calling your mother on the telephone and interceding and asking if this was true?

[Prosecutor]: Objection, your Honor. This Court has instructed counsel – it's a very limited, unusual procedure – what he can ask this witness. And now he's just avoiding the Court's instruction in my judgment anyway. We know what the question is going to be.

[Defense Counsel]: I'm only trying to get --

THE COURT: You're to inquire concerning her statements and her accusations. That's what it was limited to.

[Defense Counsel]: I have no further questions.

Later, immediately prior to calling defendant to the stand, defense counsel explained to the court that he intended to ask his client and his client's mother whether complainant told them her father had made her pregnant. Counsel argued MRE 804 rendered such testimony admissible because complainant's lack of memory made her unavailable.[3] The court ruled that the mother's testimony would constitute extrinsic evidence under MRE 613(b). The court and the attorneys then discussed whether defense counsel had elicited a sufficient denial from complainant to establish a foundation for impeachment by a prior inconsistent statement. The court nevertheless indicated that it would permit defense counsel to examine defendant regarding the matter. The prosecutor continued on the subject, and the discussion again returned to whether an inconsistent statement had been established under the circumstance that complainant denied recalling what was said. The court faulted defense counsel for failing to ask complainant whether she made false accusations and ruled that defendant could not be questioned on the subject. On appeal, defendant argues that counsel's failure to properly question complainant was ineffective and prejudicial.

A review of the record shows persistent attempts by defense counsel to alert the jury to complainant's allegations against her father. Counsel was constrained by the court's ruling that extrinsic evidence would not be permitted, by the court's treatment of the issue within the frame-work of impeachment by prior inconsistent statements, and by complainant's noncommital testimony. While counsel might have continued with his questioning of complainant in an effort to further pin her down, we cannot conclude that his representation in this regard fell below an objective standard of reasonableness. Counsel effectively presented the issue to the jury, notwithstanding the constraints imposed by the court. Defendant managed to testify that complainant had told him her father raped her. And, in both his opening statement and closing argument, defense counsel made mention of the allegation. In closing he spoke of complainant's desire for attention and the lies she told to gain control in relationships, as well

as her failure to recall having made the statements to defendant regarding her father impregnating her. Further, while the trial court found fault with counsel's questioning, the court mischaracterized complainant's testimony on recall.[4] We conclude that defense counsel performed adequately given the constraints imposed by the trial court, and that the jury was aware of the claimed false allegation and defendant has not established he was prejudiced by counsel's performance.

V.

Defendant next argues that the trial court abused its discretion in refusing the jury's repeated requests for the transcripts of defendant's and complainant's testimony. Defendant asserts that the refusal by the trial court of the second, more specific, request essentially foreclosed the possibility that the testimony would be reread.

Defendant's failure to object to the trial court's refusal to reread the testimony precludes the assertion of the issue on appeal, absent manifest injustice. *People v Davis*, 181 Mich App 354, 355; 448 NW2d 842 (1989).

Upon the first request for the transcripts of complainant's and defendant's testimony, the judge sent the jury a note explaining that the transcripts were not available, that the reporter would have to read the testimony from her notes and that the request should therefore be as specific as possible. The jury then send out a second request asking for complainant's and defendant's description of events "from the night of June 21," the night of the alleged incident. Deeming this request to be to general as well, the trial court instructed the jurors that they would be allowed to formulate a more specific request the following morning and excused them for the day. Defense counsel was present but did not object. The jurors, however, did not make another request the following day.

When a jury requests that testimony be read back to it, both the reading and extent of reading is a matter confided to the sound discretion of the trial judge. *People v Howe*, 392 Mich 670, 675; 221 NW2d 350 (1974). Here, the trial court did not preclude rereading of the transcript. Nor did the trial court preclude the formulation of a more specific request the next morning, despite the fact that the jurors did not make such a request the following day. We conclude that the trial court did not abuse its discretion in requiring the request for the transcripts be more specific.

VI.

Defendant asserts prosecutorial error involving three instances at trial. Defendant contends (1) the prosecutor elicited testimony from the police officers and defendant regarding defendant's exercise of his right to remain silent; (2) the prosecutor questioned defendant about his alleged refusal to admit paternity and his failure to pay child support; and (3) the prosecutor commented in closing argument that the defense should have presented additional character witnesses.

First, defendant alleges he was denied due process of law when the prosecutor brought in testimony regarding defendant's invocation of his right to remain silent after *Miranda* warnings were given. On direct examination of the officer who questioned defendant at the police station, the prosecutor established that defendant was given his *Miranda* warnings. The prosecutor then asked: "And did he make any statement whatsoever?" The officer responded:

> He suggested initially that he didn't have a problem speaking with us and we began to question him. Every time we would bring up an issue that [complainant] stated occurred[,] he denied it[,] and when I tried to pin him down on some detail she told me[,] at this point in time he thought it was necessary for him to speak to an attorney.

Because the prosecutor did not directly elicit the testimony regarding defendant's invocation of his right to an attorney, and because defendant did not object to this testimony and requested no cautionary instruction, we find no reversible error.

Defendant further objects that during cross-examination of defendant, the prosecutor questioned him regarding his interview at the police station and elicited testimony that after having been given his Miranda rights and having been informed of the nature of the charges against him, defendant stated, "I'm not going to tell my side of the story to you." Defendant failed to object to the question. In light of the failure to object, and under the circumstance that defendant had already testified on direct examination that when the officer informed him complainant had accused him of rape, he said " I've got nothing to say. I'm not saying a word," we again conclude there was no reversible error.

Defendant next asserts that he was denied due process when the prosecutor questioned him regarding his alleged failure to acknowledge paternity and pay child support. However, the prosecutor's questions pertained to issues raised by defense counsel on direct examination. Further, there was no objection to the line of questioning. We again conclude there was no reversible error. *People v Hayward*, 127 Mich App 50, 59; 338 NW2d 549 (1983); *People v Thomas Jones*, 73 Mich App 107, 110; 251 NW2d 264 (1976).

Defendant further argues that the prosecutor, in rebuttal, improperly shifted the burden of proof to defendant by asserting that defendant had not called certain character witnesses to testify to defendant's honesty, and that all character witnesses called were in a position that they would testify favorably without regard to defendant's actual character.

Appellate review of alleged erroneous prosecutorial comments is foreclosed where defense counsel failed to object at trial unless the prejudicial effect was so great that it could not have been cured by an appropriate instruction and failure to consider the issue would result in a miscarriage of justice. *People v Foster*, 175 Mich App 311, 317-19; 437 NW2d 395 (1989); *People v Frederico*, 146 Mich App 776; 381 NW2d 819 (1985). The test for prosecutorial misconduct is whether defendant was denied a fair and impartial trial. *Foster, supra*. We first conclude that defendant's

failure to object bars review. We further observe that the prosecutor merely responded to defense counsel's statement that he could have "paraded a courtroom full of [character witnesses] through" and called upon the jury to evaluate the kind of character witnesses the defense had called. Further, in its charge to the jury, the trial court instructed that the "defendant is not required to prove his innocence or to do anything." We conclude that the

prosecutor's remarks were not improper, and any error that resulted therefrom was corrected by the instruction to the jury.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Helene N. White
/s/ Michael W. LaBeau

[1] Defendant's foundation objection at trial was based on Dr. Okun's failure to conduct an evaluation of defendant or complainant.

[2] The court repeated this ruling during defendant's opening statement, which had been reserved, when defense counsel informed the jury that complainant had previously told defendant that her father had impregnated her. Defendant does not challenge on appeal the trial court's rulings excluding third-party testimony regarding the accusation and its falsity.

[3] We note that there was no need to invoke an exception to the hearsay rule because the complainant-declarant's statement was not being offered for the truth of the statement. Defendant sought only to prove that complainant had made the statement.

[4] While complainant testified she was not sure what she told defendant and his mother, she also testified she did not remember telling defendant that her father made her pregnant, and that she did not know if it was possible that she told them. She never used the word "exactly," as stated by the court.