STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES WASHINGTON CAMPBELL,

Defendant-Appellant.

UNPUBLISHED
June 7, 1996

No. 159128
LC No. 90-001772

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES CAMPBELL, a/k/a JAMES CAMPBELL, JR.,

Defendant-Appellant.

No. 169869
LC No. 90-001772

Before: Corrigan, P.J., and MacKenzie and P.J. Clulo,* JJ.

PER CURIAM.

In docket no. 159128, defendant appeals as of right his conviction by jury of third-degree criminal sexual conduct, MCL 750.520d; MSA 28.788(4), and sentence to a thirty- to eighty-month term of imprisonment. In docket no. 169869, defendant appeals as of right his conditional guilty plea of carrying a concealed weapon, MCL 750.227; MSA 28.424, and concurrent sentence to a term of 90 days to five years. In defendant's consolidated appeals, we affirm.

---

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

In docket no. 159128, defendant first argues that the prosecutor failed to present sufficient evidence to establish that he used force or coercion.

> "Force or coercion *includes but is not limited to*" physical force or violence, threats of force, threats of retaliation, inappropriate medical treatment, or concealment or surprise. MCL 750.520b(1)(f); MSA 28.788(2)(1)(f). Force or coercion is not limited to physical violence but is instead determined in light of all the circumstances. [*People v Brown*, 197 Mich App 448, 450; 495 NW2d 812 (1992) (discussing force or coercion element of first-degree criminal sexual conduct which is identical to that for third-degree criminal sexual conduct).]

Viewing the evidence in a light most favorable to the prosecution, *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, modified 441 Mich 1201 (1992), we conclude that sufficient evidence was presented from which a rational trier of fact could find the element of force or coercion beyond a reasonable doubt. While the record does not reflect evidence of the use of actual physical force or threats to accomplish penetration, defendant, a bus driver, created a coercive atmosphere by driving complainant, his only passenger, to a remote location, locking the bus doors and turning off the lights so that the victim could not summon help. See *People v McGill*, 131 Mich App 465, 474; 346 NW2d 572 (1984). Defendant then sodomized complainant despite her cries and other indications that she did not want to have sexual relations.

Defendant contends that the trial court abused its discretion when it permitted the endorsement of a prosecution witness on the morning of trial. Defendant correctly notes that other than the fact that another witness was not present at trial, no evidence demonstrates that the prosecutor had "good cause" for the late amendment of his witness list. MCL 767.40a; MSA 28.980(1). However, a violation of section 40a does not require automatic dismissal, and the trial court has the discretion to fashion a remedy for noncompliance with the statute. *People v Lino (After Remand)*, 213 Mich App 89, 92; 539 NW2d 545 (1995). Upon learning that the new witness would testify with regard to the same matters as the absent witness, the trial court permitted the late endorsement, but stated that defendant could raise the issue again if the testimony exceeded this scope. Defendant, however, did not seek relief when the witness testified. Moreover, the witness' testimony concerned the undisputed issue that defendant was the driver of the bus in which the complainant had been riding on the day of the assault. Accordingly, because the trial court provided defendant with a means to cure any potential prejudice and the testimony pertained to an undisputed factual issue, the trial court did not abuse its discretion in permitting an untimely addition to the prosecutor's witness list.

Defendant next argues that the trial court abused its discretion when it permitted a witness to testify about a request by police officers that defendant remove his hat at the time of his arrest. Defendant contends that the testimony was hearsay. We disagree. Even if the question elicited information regarding what complainant told the police, the testimony was not offered to prove the truth of the matter asserted, but only to explain why the police took certain action. Moreover, any error was harmless because complainant testified and was cross-examined by defense counsel. *People v Lewis*,

168 Mich App 255, 267-268; 423 NW2d 637 (1988). The testimony also provided the context for the witness' testimony that he saw defendant remove his hat. *People v Flaherty,* 165 Mich App 113, 122; 418 NW2d 695 (1987).

Defendant contends that he was denied a fair trial by the prosecutor's remarks during his rebuttal argument. We disagree. The comment regarding defense counsel's failure to ask complainant certain questions did not shift the burden of proof because it did not infringe upon defendant's right not to testify nor did it imply that the jury could find an element of the offense on the basis of the failure to ask questions. *People v Fields,* 450 Mich 94, 108-113; 538 NW2d 356 (1995).

Defendant's final argument in docket no. 159128 is that the examining magistrate abused his discretion in binding defendant over on first-degree criminal sexual conduct when no evidence established the force or coercion element of the offense. Defendant failed to preserve this issue by moving to quash the information for the reason now raised on appeal. *People v Fleming,* 185 Mich App 270, 273; 460 NW2d 602 (1990). No miscarriage of justice would result from our failure to review this issue because sufficient evidence to establish the force or coercion element of the offense was presented at trial. *People v Miller,* 130 Mich App 116, 118; 342 NW2d 926 (1983).

In docket no. 169869, defendant contends that the trial court erred when it declined to suppress a gun discovered during a search of defendant's gym bag after his arrest for criminal sexual conduct. We disagree. Because the police could have searched the bag at the time of defendant's arrest, *People v Cumbus,* 143 Mich App 115, 119; 371 NW2d 493 (1985), the search upon defendant's arrival at the police station was a proper warrantless search incident to a lawful arrest. *People v Crawford,* 202 Mich App 537, 539; 509 NW2d 519 (1993). Finally, because no deficiency appears on the record, defendant was not denied the effective assistance of counsel by trial counsel's failure to argue at the suppression hearing that the evidence should have been suppressed as a remedy for the alleged perjury of a police officer in his investigation report. *People v Juarez,* 158 Mich App 66, 73; 404 NW2d 222 (1987).

Affirmed.

/s/ Maura D. Corrigan
/s/ Barbara B. MacKenzie
/s/ Paul J. Clulo