STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK KOENIG,

Defendant-Appellant.

UNPUBLISHED
June 7, 1996

No. 172117
LC No. 90-104135-FC

Before: Reilly P.J., and Michael J. Kelly, and C.L. Bosman,* JJ.

PER CURIAM.

Defendant was convicted of kidnapping, MCL 750.349; MSA 28.581, by a jury and was sentenced to prison for two years, six months to twenty years. He appeals as of right. We affirm.

Defendant first contends that his due process rights were violated because the police destroyed evidence. However, defendant has failed to establish that the card and the tape were exculpatory in nature and has failed to make a showing of bad faith on the part of the police. *People v Leo*, 188 Mich App 417, 427; 470 NW2d 423 (1992).

Defendant contends that he was denied a fair trial by the police and prosecutor's failure to attempt to discover the identity of critical res gestae witnesses and provide that information to the defense. However, defendant's position was rejected in *People v Burwick*, 450 Mich 281, 287; 537 NW2d 813 (1995), in which the Supreme Court held that MCL 767.40a; MSA 28.980(1) "does not impose an obligation on the prosecutor to discover and produce unknown witnesses. . . . ."

Defendant argues that he was denied a personal constitutional right to testify because he did not waive that right on the record at trial. As recognized by defendant, this argument has previously been rejected by this Court. *People v Harris*, 190 Mich App 652, 663-664; 476 NW2d 767 (1991). We are not persuaded that the facts of this case compel a different result.

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

Defendant contends that he was denied effective assistance of counsel because, if counsel advised him at all with regard to whether he should testify, the advice not to testify denied him a fair trial because his testimony was the only means to present a defense. We disagree. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990); *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Defendant has not overcome the presumption that the challenged action might be considered sound trial strategy. *Id.*

Defendant also argues that he was denied effective assistance of counsel by counsel's failure to use the transcript of the previous trial to impeach the complainant. Defendant has not identified on what statements, if any, the complainant could have been impeached. Therefore, defendant has not shown that counsel's performance was deficient or that he was prejudiced by the alleged error. *Id*.

Defendant contends that the prosecutor's comments on defendant's right to remain silent deprived him of a fair trial. Having reviewed the remarks in context, we do not agree that they should be construed as comments on defendant's failure to testify. See *People v Guenther*, 188 Mich App 174, 176-180; 469 NW2d 59 (1991).

Defendant argues that he was denied a fair trial by the improper admission of evidence. He contends that the complainant's mother's testimony about what the complainant told her was hearsay and improperly bolstered the complainant's testimony. The complainant's mother testified that the complainant said that defendant "had beaten her, put a gun to her head and pulled the trigger one time, beaten her with a belt - - " Defense counsel objected that the mother's testimony was inconsistent with her earlier testimony. Therefore, defendant's assertion on appeal that the testimony was hearsay is not preserved for appellate review because it was not stated as the grounds of the objection at trial. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). Defense counsel did raise a hearsay objection to the line of questioning that culminated in the mother's testimony that the complainant told her that "they would have several men and ladies present that would have sex with each other." The prosecution argued, "Defense counsel had clearly insinuated that [the complainant] acted out of fear of her mother and this testimony is offered for the purpose of showing that [the complainant] was not fearful of what her mother knew." To the extent that the testimony was admitted for that purpose, it was not being offered for the truth of the matter asserted and was not hearsay. To the extent that it might have been used for the truth of the matter asserted, it was merely cumulative of other evidence, including photographs, that had already been admitted. Therefore, the error, if any, was harmless.

Defendant also asserts that it was reversible error for a witness to "vouch for the credibility" of the investigating detective. The prosecutor asked the witness about the detective's "reputation as a police officer." Counsel objected that the detective's reputation "is not germane to the issue before the Court . . . ." Because defendant did not assert the same basis for objection at trial as he now asserts on appeal, the objection is not preserved for review. *Id.* In any event, any error in the admission of this witness' testimony that the detective is "very highly regarded as an investigator" was harmless.

The court did not abuse its discretion by allowing a trooper to testify that he provided information to his units to "consider the subject armed and possibly dangerous". The statement was not hearsay because it was not offered to prove that defendant was in fact "armed and possibly dangerous." Furthermore, there was no danger that the jury would use it for that purpose because the testimony indicated that the police did not find a gun in defendant's car when it was stopped.

Defendant also argues that the trial court improperly restricted the admission of evidence concerning the complainant's former relationships. Defendant does not provide citations to the record where the court made the ruling that he contends was erroneous. Our review of the record indicates that the ruling that defendant seems to be challenging occurred during a line of questioning in which defense counsel asked the complainant if she lived with Mr. Mooretuck before her relationship with defendant. The court sustained the prosecutor's objection on relevance grounds. In response to defense counsel's further questions, the complainant testified that she knew Mooretuck and that he owned an executive health spa. After she denied being employed there, the court asked defense counsel, "What is the relevance?" Defense counsel and the court had the following discussion:

> [Defense counsel:] Your Honor, I believe it is relevant as to her background and the situation as far as what she claimed about certain activities that she engaged in, Your Honor.
>
> The Court: Well, I mean what has it got to do - -
>
> [Defense counsel:] That's fine, Your Honor I will move on.

Defense counsel abandoned this line of questioning. He did not make an offer of proof as is necessary to preserve the issue for appellate review. MRE 103(a)(2). *People v Stacy*, 193 Mich App 19, 31; 484 NW2d 675 (1992). Furthermore, the court had broad discretion to limit cross-examination about matters, such as the complainant's sexual relationships, that were of marginal relevance to the kidnapping charge. See *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). We find no abuse of discretion.

We also find no abuse of discretion in the court's refusal to admit photographs of the places where defendant, complainant and their child stopped on their trip after the kidnapping. The witness through whom defendant sought to admit the photographs, defendant's brother, was not present at those places on the date of the kidnapping, and therefore, could not lay the proper foundation for this evidence.

Defendant's brief also states that he was "not allowed to introduce the testimony of a psychologist who was requested to examine [defendant]." No further argument is made on this issue, and we deem it abandoned.

Defendant also claims that he was unable to introduce evidence that the complainant told defendant's divorce attorney that there was nothing to the kidnapping story, that the charges were going

to be dropped and she had been pressured into doing it. At the prosecutor's suggestion, the court asked defendant to waive his attorney-client privilege. Defendant did so without objection and without limitation. The attorney was called as a witness, but defense counsel did not inquire about the complainant's statements defendant now claims should have been admitted. We fail to see how the court's request that defendant waive his privilege, which defendant willingly did, precluded defense counsel from inquiring about the complainant's statements to defendant's divorce attorney. The record does not support defendant's claim that defense counsel was "unable" to introduce this evidence because of a ruling of the trial court.

Defendant also contends that the prosecutor introduced "a great deal of highly damaging, irrelevant, unfairly prejudicial, and inflammatory evidence which, in its cumulative effect, denied defendant a fair trial." Even assuming that the admission of evidence that defendant had not paid child support, that he showed his son pictures of the complainant that upset him, that the complainant underwent two years of therapy after the incident, that defendant's brother had "trouble with the law", and that defendant had been married before and had photographs of sexual encounters that occurred before he knew the complainant was erroneous, we do not agree with defendant that he was denied a fair trial. Furthermore, contrary to defendant's assertions, no evidence was admitted that defendant threatened to kill Mooretuck or that defendant's other child was missing. Although the prosecutor twice asked witnesses if they knew of the threat or that the child was missing, the witnesses responded negatively. The jury was instructed that the questions of counsel are not evidence.

Finally, we consider defendant's challenges to the scoring of the sentencing guidelines and the proportionality of his sentence. The judges' scoring of the sentencing guidelines will be upheld if there is evidence to support the score. *People v Hernandez*, 443 Mich 1,16; 503 NW2d 629 (1993). Evidence that defendant reached behind his back and threatened to blow his brains out supported scoring OV 1 five points because defendant "implied" that he had a firearm. We also agree with the court that defendant's and complainant's son may be counted as a victim for the purposes of OV 6. The complainant's testimony that she was in therapy for two years supported the scoring of OV 13. Defendant's sentence, which was within the recommended range of the sentencing guidelines, was proportionate to the nature of the offense and the offender.

Affirmed.

/s/ Maureen Pulte Reilly
/s/ Michael J. Kelly
/s/ Calvin L. Bosman