

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT HUDSON,

Defendant-Appellant.

UNPUBLISHED

August 2, 1996

No. 181724

LC No. 93-011190

Before: Michael J. Kelly, P.J., and Markman and J. L. Martlew,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of assault with intent to commit sexual conduct involving penetration, MCL 750.520g(1); MSA 28.2788(7)(1), and one count of breaking and entering an occupied dwelling with the intent to commit criminal sexual conduct, MCL 750.110; MSA 28.305. He was sentenced to four to ten years' imprisonment for the assault conviction, as well as four to fifteen years' imprisonment for the breaking and entering conviction. He appeals as of right and we affirm.

First, defendant argues that he was denied a fair and impartial trial due to many instances of alleged prosecutorial misconduct during closing arguments. However, defendant failed to object to any of these instances of conduct and we find that a proper instruction would have cured any alleged prejudice. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). Therefore, we believe no manifest injustice will result from our failure to review defendant's claims of misconduct.

Next, defendant argues that the prosecution failed to notify him of its intent to have a witness, Dr. Paige, testify during rebuttal. Therefore, defendant argues that the trial court erred in allowing Dr. Paige's testimony into evidence. See MCL 768.20a; MSA 28.1043(1); MCL 768.21(2); MSA 28.1044(2). However, defendant failed to object to the admission of Dr. Paige's testimony below. Therefore, defendant has waived appellate review of this issue. *People v Lyles*, 148 Mich App 583, 597-598; 385 NW2d 676 (1986); *People v Khabar*, 126 Mich App 138, 141; 337 NW2d 9 (1983).

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

Further, under our review of the circumstances, it is clear that defendant was neither surprised nor prejudiced by the rebuttal testimony of the psychiatrist who had interviewed him one year earlier. At worst, the prosecutor's failure to comply with the rules is harmless error. *People v Wallace*, 160 Mich App. 1,5; 408 NW2d 87 (1987); *People v Fisher*, 87 Mich App 350, 354-56; 274 NW2d 788 (1978).

Defendant next argues that he was denied effective assistance of counsel at trial because his counsel failed to object to the allowance of Paige's rebuttal testimony. Claims of ineffective assistance of counsel based on defense counsel's failure to object or make motions which could not have affected defendant's chances for acquittal are without merit. *Lyles, supra*, at 596. Defendant did not seek a *Ginther* hearing. Because there was ample evidence to support defendant's conviction, and because it is likely that Dr. Paige's testimony would have been admitted under any circumstances, the failure to object did not prejudice defendant or impinge upon his chances of acquittal. As such, defense counsel's failure to object did not constitute ineffective assistance of counsel.

Finally, defendant argues that there was insufficient evidence to support his conviction. In reviewing a challenge to the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992); *People v Hampton*, 407 Mich 354, 366; 285 NW2d 284 (1979). Specifically, defendant contests that he assaulted the victim with the intent to commit criminal sexual conduct. We disagree.

Questions of intent should be left to the trier of fact to resolve. *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988). Moreover, intent may be inferred from all the facts and circumstances. *People v Johnson*, 54 Mich App 303; 220 NW2d 705 (1974). In this case, we believe the jury properly inferred defendant's intent from the circumstances surrounding the assault of the victim. Testimony showed that defendant broke into the house belonging to the victim's parents and laid on top of the nine-year old victim. He then questioned her, "Are you gonna' give me some pussy?" and then fled the house when she began to scream. With regard to the "credibility contest" between the victim and defendant, the jury obviously did not believe defendant's claims that he lacked the intent to have sex or desired consensual sex. In the context of a sufficiency of the evidence issue, determinations based on the weight and credibility of evidence should not be disturbed on appeal. *People v Martin*, 199 Mich App 124, 135; 501 NW2d 198 (1993). See also *People v Evans*, 173 Mich App 631, 634-637; 434 NW2d 452 (1988). Accordingly, we find that sufficient evidence exists to support defendant's conviction.

Affirmed.

/s/ Michael J. Kelly
/s/ Stephen J. Markman
/s/ Jeffrey L. Martlew

