STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LONNIE JAY BRUMMIT, a/k/a LARRY JAY BRAMMETT, a/k/a LONNIE STEVENS, a/k/a ROBERT ST. CLAIR,

Defendant-Appellant.

UNPUBLISHED
May 6, 1997

No. 187185
Macomb Circuit Court
LC No. 94-000706-FC

Before: Wahls, P.J., and Hood and Jansen, JJ.

PER CURIAM.

Defendant appeals by leave granted from his jury trial conviction of third-degree criminal sexual conduct, MCL 750.520d; MSA 28.788(4). Defendant was sentenced to five to fifteen years' imprisonment. We affirm.

Defendant first argues that he was denied his due process rights when the prosecution and police failed to investigate the victim's account of being stopped by Warren police officers shortly before the assault. Defendant's basic contention is that the prosecution and police should have identified and interviewed those officers or at least made them available to testify, and that their failure to do so entitles defendant to a new trial.

Defendants have a due process right to obtain exculpatory information or evidence within the prosecutor's control that would "raise a reasonable doubt about the defendant's guilt." *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994); *People v Davis*, 199 Mich App 502, 514; 503 NW2d 457 (1993). However, the prosecution does not have an affirmative duty to search for evidence to aid the defendant's case. *People v Burwick*, 450 Mich 281, 289 n 10 ; 537 NW2d 813 (1995). With respect to witnesses, the prosecution is only required to (1) give the defendant *notice* of all *known* witnesses who might be called and all other *known* res gestae witnesses, and (2) provide law enforcement assistance, upon request, to locate and serve process upon witnesses. *Id*. at 288-289.

Upon review of the record, we find no reversible error. First, the Warren police officers in question, even if known by the prosecution, were not res gestae witnesses. A res gestae witness is one "who was witness to some event in the continuum of a criminal transaction and whose testimony will aid in developing a full disclosure of the facts surrounding the alleged commission of the charged offense." *People v Hatch*, 156 Mich App 265, 266-267; 401 NW2d 344 (1986). Furthermore, defendant does not assert that the officers were endorsed on the information or that the prosecution intended to call them. Thus, the prosecution had no affirmative duty to discover, endorse, or produce the officers. See *Burwick*, *supra* at 289, n 10.

Second, there is no indication from the record that the prosecution or police impeded defense counsel's ability to locate the officers and interview them himself. In fact, the evidence showed that defendant was actually offered assistance in locating the officers. Detective Daniel Novak gave the following testimony at trial regarding his attempts to comply with defense counsel's requests: "Well, your Honor, I gave him the log sheets and the schedule of everyone who worked that shift and I said tell me who you want here I'll go subpoena them. He gave me subpoenas with no names on them." This was not a case where the police or prosecution suppressed or failed to produce exculpatory evidence upon request. Defendant was not denied a fair trial.

Defendant's next argues that the trial court erred in refusing to answer the jury's question about whether the victim was required to testify. MCR 6.414(F) provides that "[a]fter jury deliberations begin, the court may give additional instructions that are appropriate." Furthermore, "the trial court must . . . take appropriate steps to ensure that jurors will not be exposed to information or influences that might affect their ability to render an impartial verdict on the evidence presented in court." MCR 6.414(A).

Defendant cites *People v Martin*, 392 Mich 553; 221 NW2d 336 (1974), for the general proposition that, where a jury expresses confusion, the trial court is obligated to guide the jury by providing a "'lucid statement of the relevant legal criteria.'" *Id*. at 558 (quoting *Bollenbach v United States*, 326 US 607, 612; 66 S Ct 402; 90 L Ed 350 (1946)). However, defendant's reliance on *Martin* is misplaced because the record in this case reveals no such confusion. Defendant does not claim that the trial court's instructions did not adequately apprise the jury of the elements of the offenses charged, the applicable defenses, or defendant's theory of the case. He argues only that providing the jury with the requested information would have "helped the jury decide whether or not [the victim's] testimony was believable." However, this information would have provided the jury with an inappropriate basis for assessing the victim's credibility because there was no evidence to suggest that the victim's testimony at either the preliminary examination or the trial may have been coerced. Accordingly, we conclude that the trial court's response was appropriate under the circumstances and that the court did not abuse its discretion.

Defendant next argues that the trial court erred in handling the jury's request to rehear testimony. "This Court reviews decisions regarding the rereading of testimony for an abuse of discretion." *People v Davis*, 216 Mich App 47, 56; 549 NW2d 1 (1996). MCR 6.414(H) provides that the trial court may not "refuse a reasonable request" for a review of certain testimony or evidence.

However, "[t]he court may order the jury to deliberate further without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed." MCR 6.414(H). Consequently, a trial court abuses its discretion when: "(1) [it] denies a request to rehear testimony, *and* (2) forecloses the possibility that such a rehearing will ever be granted." *People v Robbins*, 132 Mich App 616, 621; 347 NW2d 765 (1984).

Here, the trial court denied the jury's initial request for the transcript. However, the court "specifically left open the possibility that testimony could be reheard if the jury could not resolve its problems during the course of deliberations." *Id.*; see also *People v Austin*, 209 Mich App 564, 569; 531 NW2d 811 (1995). In fact, when the jury later requested that testimony concerning where and when defendant stopped for orange juice or cigarettes be read back, this request was granted. Because the trial court did not foreclose the possibility of the jury reviewing testimony, we conclude that there was no abuse of discretion.

Next, defendant, in his supplemental brief, claims that he was denied the effective assistance of counsel. Specifically, defendant claims that trial counsel was ineffective for failing to call certain witnesses who would have proven that the complainant was a prostitute.

In order to prove a claim of ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant so as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). Defendant did not move for a new trial or an evidentiary hearing on this basis below. Therefore, our review of this issue is limited to the record before us. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

Defendant's defense was consent and that the complainant was a prostitute who became angry when defendant would not drive her closer to her home. Defendant argues that the witnesses not called by counsel at trial would have testified that the complainant was a prostitute. Even if we accept this as true, we cannot conclude that defendant was deprived of a defense. Defendant testified in his own behalf that the complainant was a prostitute and that they engaged in consensual sex. Defendant has not shown that he was prejudiced by counsel's failure to call the witnesses; that is, that there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. *Pickens*, *supra*, p 314. Accordingly, we are unable to conclude on the record before us that defendant was denied the effective assistance of counsel.

Lastly, we note that defendant had raised an issue regarding his presentence report; however, at oral argument, defense counsel stated that the issue was being abandoned. Accordingly, we need not review it.

Affirmed.

/s/ Myron H. Wahls
/s/ Harold Hood
/s/ Kathleen Jansen