STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN LOMNICKI,

Defendant-Appellant.

UNPUBLISHED
September 16, 1997

No. 188676
Macomb Circuit Court
LC No. 93-000984-FC

Before: Wahls, P.J., and Taylor and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a) (victim under thirteen years of age). He was sentenced to a single term of 18 to 35 years' imprisonment for both convictions. Defendant now appeals as of right. We affirm.

Defendant first contends that the trial court erred in denying his motion for a new trial because his right to a fair trial was violated when several jurors gave untrue responses on their questionnaires and during voir dire. We disagree. This Court will not disturb a trial court's grant or denial of a motion for a new trial absent an abuse of discretion. *People v Bart*, 220 Mich App 1, 11; 558 NW2d 449 (1996).

Initially, we believe the alleged untrue statements do not evidence any attempt at fraud or misrepresentation by any of the challenged jurors. Rather, each alleged untrue statement can be categorized as an innocent oversight by individuals not fluent in the law who had no reason to believe their answers were incorrect. The purpose of voir dire of prospective jurors is to afford counsel the opportunity to develop a rational basis for exercising both challenges for cause and peremptory challenges. *People v Vesnaugh*, 128 Mich App 440, 444; 340 NW2d 651 (1983). Here, none of the alleged untrue statements would provide grounds for challenging any of the jurors for cause. Furthermore, defendant's claim that he was entitled to a new trial because had he known of the untrue statements, he would have exercised his peremptory challenges, is without merit. MCR 6.412 only requires "intelligent" peremptory challenges; it does not require that defendant have absolute knowledge

regarding a juror. See *People v Hubbard*, 217 Mich App 459, 467-468; 552 NW2d 593 (1996). A peremptory challenge is exercised unintelligently and pointlessly when the exercise would not prevent error, eliminate its prejudice, or further demonstrate the error and its prejudice. *Id*. In the present case, because defendant has failed to direct us to any error or prejudice suffered as a result of the impaneling of the contested jurors, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Defendant next contends that the prosecution's references to him as a child molester during opening and closing statements constituted prosecutorial misconduct. Because defendant failed to object to the prosecution's comments, the issue is unpreserved. Consideration of unpreserved challenges to alleged misconduct is limited to whether our failure to review would result in a miscarriage of justice. *People v Mitchell*, 223 Mich App 395, 400; 566 NW2d 312 (1997). Here, our failure to provide further review will not result in a miscarriage of justice because we find nothing improper in the prosecution's comments. Furthermore, even assuming the comments were improper, any possible prejudice was cured by the trial court's instruction to the jurors that they were not to consider the questions and comments of the attorneys as evidence.

Defendant also contends that the admission of a book given to complainant by defendant and a photograph depicting complainant in a dress given to her by defendant, to which defendant objected at trial, constituted misconduct because the evidence was not provided to defendant until the day of trial. Because the trial court did not enter a discovery order, the prosecution's failure to produce the evidence only constitutes misconduct if it violated the criminal discovery court rule, MCR 6.201. Here, the record establishes that the prosecution became aware of the photograph a few days prior to the start of trial and provided a copy to defendant. Defendant admitted that he had a copy of the photograph on the day he made his objection. The book was provided to the prosecution at the same time as the photograph, but apparently it was misplaced until the middle of trial and a copy of the relevant portions of the book was transmitted to defendant on the same day. After allowing defendant the opportunity to voir dire the complainant regarding the origin and writing in the book, the trial court ruled the evidence was admissible. Based on MCR 6.201, we find no prosecutorial misconduct under these facts.

Similarly, defendant contends that the trial court abused its discretion in admitting photographs of complainant and her residence because the pictures were provided to defendant after the expiration of the discovery period dictated by MCR 6.201. Because the prosecution promptly provided the evidence upon receipt and defendant was allowed to question complainant, we find that the trial court did not abuse its discretion in allowing this evidence to be admitted. MCR 6.201(I). See *People v Clark*, 164 Mich App 224, 229; 416 NW2d 390 (1987).

Defendant next contends that the trial court erred in permitting an in-camera review of his expert and thereby revealing his defense strategy. Although certain disclosure is now mandatory under MCR 6.201, a court's decision to order an in-camera review remains discretionary. *People v Laws*, 218 Mich App 447, 455; 554 NW2d 586 (1996). Because the hearing at issue was held to determine whether the expert's theories were generally acceptable in the medical community and defendant's expert's in-camera testimony only pertained to those theories, we believe the court did not abuse its

discretion in holding the review. Moreover, we note that because defendant did not call the expert to testify, defendant did not suffer any prejudice from the review.

Defendant next contends that his sentence was disproportionate and/or improper because the minimum sentence exceeds his life expectancy. Relying upon *People v Moore*, 432 Mich 311; 439 NW2d 684 (1989), defendant argues the trial court was required to impose a sentence which a defendant in his age group could be expected to serve. However, this argument is without merit. *People v Lemons*, 454 Mich 234; 562 NW2d 447 (1997); *People v Merriweather*, 447 Mich 799; 527 NW2d 460 (1994).

Defendant's final argument is that the trial court erred in the scoring of his PSIR for Offense Variable 2. However, appellate relief is not available for errors based on alleged misapplication of the scoring guidelines. *People v Mitchell*, 454 Mich 145, 178; 560 NW2d 600 (1997). "[A]pplication of the guidelines states a cognizable claim on appeal only where (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate." *Id*. at 177. Because defendant's argument does not meet these criteria, defendant is not entitled to appellate review on this issue.

Affirmed.

/s/ Myron H. Wahls
/s/ Clifford W. Taylor
/s/ Joel P. Hoekstra