

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY P. MCCULLOUGH,

Defendant-Appellant.

UNPUBLISHED
November 4, 1997

No. 187160
Oakland Circuit
LC No. 95-137267-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DUNCAN EDWARD CAMERON,

Defendant-Appellant.

No. 191612
Oakland Circuit
LC No. 95-137268-FC

Before: Sawyer, P.J., and Hood and Hoekstra, JJ.

PER CURIAM.

Following a consolidated jury trial, defendants were each convicted of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2). After determining that both defendants were second-felony offenders, MCL 769.10; MSA 28.279, the trial court sentenced defendant McCullough to ten to twenty years' imprisonment and defendant Cameron to eight to twenty years' imprisonment. Defendants' appeals were consolidated for purposes of appellate review. We affirm McCullough's conviction and remand for an evidentiary hearing with regard to Cameron only.

I

This case arises from a sexual assault committed by defendants and a third individual, Michael MacKay. McCullough and Cameron were represented by the same attorney. On appeal, defendants argue that the trial court did not comply with the court rules regarding joint representation. We agree. Neither the judge nor defense counsel stated on the record their reasons for believing that the joint representation would not cause a conflict of interest as required under MCR 6.005(F)(1) and (3). Moreover, the judge violated MCR 6.005(G) by failing to determine whether a conflict of interest existed during trial, despite the fact that McCullough repeatedly indicated to the court that he was dissatisfied with defense counsel's performance. Nevertheless, reversal is not warranted.

Although the rule is written in mandatory terms, a failure to comply does not require reversal where there is no conflict of interest actually affecting the adequacy of representation. See e.g. *People v Lafay*, 182 Mich App 528, 531; 452 NW2d 852 (1990). Here, McCullough and Cameron never deviated with regard to the central issue in the case: whether their contact with the complainant was consensual. Under such circumstances, we find that the joint representation did not result in a conflict of interest.

Next, defendants argue that the trial court abused its discretion in denying their requests for severance or separate juries. Whenever two or more defendants are jointly indicted in connection with a criminal offense, it is within the trial court's discretion whether to try them separately or jointly. MCL 768.5; MSA 28.1028; MCR 6.121. This state favors joint trials. *People v Wakeford*, 418 Mich 95, 119; 341 NW2d 68 (1983). Inconsistency of defenses is not enough to mandate severance. Rather, the defenses must be mutually exclusive or irreconcilable. Incidental spill-over prejudice which may result in multi-defendant trials does not suffice. *People v Hana*, 447 Mich 325, 349; 524 NW2d 682 (1994). In the instant case, both defendants testified to having one act of consensual sexual contact with the complainant. Therefore, the defenses were neither mutually exclusive nor irreconcilable.

Defendants' claim that prejudice resulted because the jurors heard both of them testify in a manner which was inconsistent with their prior statements to police involves incidental spill-over prejudice at best, which did not prevent the jury from making a reliable judgment about defendants' guilt or innocence. Because both McCullough and Cameron made inconsistent statements prior to trial, defendants would have had their credibility impeached regardless of whether they were tried alone or together.

Defendants also claim ineffective assistance of counsel based upon numerous alleged errors contained in the record, all of which are without merit. In sum, defendants claim that defense counsel (1) failed to properly cross-examine the complainant; (2) was not adequately prepared for trial; (3) failed to ask the jury to convict defendant Cameron of a lesser offense which also included violence or force as an element; (4) entered into a stipulation regarding Cameron's knowledge of whether his statement to the police was recorded; (5) failed to object to the complainant's "sympathy tactics"; and (6) failed to object to the prosecution's closing argument. Here, most of defendants' claims involve matters of trial strategy for which this Court

will not substitute its judgment for that of trial counsel. *People v Ferguson*, 208 Mich App 508, 513; 528 NW2d 825 (1995). Defendants have failed to prove that counsel's performance with regard to the above allegations fell below an objective standard of reasonableness and that but for the above alleged errors, the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

II

Separately, McCullough contends that the trial court abused its discretion in allowing Cameron's prior inconsistent statements into evidence as substantive evidence against him. We find that any error which resulted from the admission of these statements was harmless beyond a reasonable doubt. Cameron's statements did not implicate McCullough in any way that was materially inconsistent with McCullough's testimony on the witness stand. Accordingly, no prejudice resulted even if the jurors relied upon Cameron's statements as substantive evidence against McCullough.

Next, McCullough argues that reversal is warranted because the prosecutor committed numerous acts of misconduct at trial. According to McCullough, the prosecutor improperly: (1) vouched for the credibility of the complainant by telling the jury that the complainant had testified in a truthful manner; (2) gave her own personal opinion as to what actually occurred inside Cameron's apartment; (3) appealed to the sympathy of the jurors when she apologized for the conduct of McCullough, Cameron and Mackay; (4) asked the jurors to convict defendants as part of their civic duty; (5) allowed witnesses to perjure themselves on the witness stand; (6) argued facts which were not in evidence by telling the jurors that defendant tortured the complainant on the night in question and then tried to intimidate the complainant by calling her at home; and (7) withheld important facts from the jury when she failed to impeach the complainant with her prior inconsistent statements.

McCullough did not object to any of the instances of alleged prosecutorial misconduct. Appellate review of allegedly improper remarks is generally precluded absent a timely objection by counsel, unless a curative instruction could not have eliminated the prejudicial effect, or where failure to consider the issue would result in a miscarriage of justice. *Stanaway, supra* at 687. After reviewing the record, we find that either the acts complained of were not improper or that any possible prejudice could have been cured had McCullough made appropriate objections below. Accordingly, reversal is not warranted on this basis. *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996).

Next, McCullough argues that the trial court erred in failing to give a specific unanimity instruction. Absent a request or objection, our review is generally limited to the issue of whether relief is necessary to avoid manifest injustice. *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). Although the specific act of sexual penetration was in dispute, that issue was not central to the case. All of the witnesses agreed that McCullough committed only one sex act and defendants presented a unified consent defense. The only question to be decided was whether the sexual contact was the product of force or coercion. In essence, the verdict turned on whether the jurors believed the testimony of the complainant or the defense theory of the case.

Under such circumstances, we find no manifest injustice. See *People v Van Dorsten*, 441 Mich 540, 545; 494 NW2d 737 (1993). Because no prejudice resulted from the jury instructions, McCullough's ineffective assistance of counsel argument on this basis is also without merit.

McCullough next contends that the evidence was insufficient to sustain his first-degree criminal sexual conduct conviction because there was no proof that he personally used force or coercion to accomplish the sexual penetration. We disagree. The existence of force or coercion is to be determined in light of all the circumstances and is not limited to acts of physical violence. *People v Malkowski*, 198 Mich App 610, 613; 499 NW2d 450 (1993). The victim is not required to resist the actor in order for a conviction to result. *People v Jansson*, 116 Mich App 674, 683; 323 NW2d 508 (1982). Here, the complainant testified that McCullough was called into the bedroom by Mackay and told that he was "next." At the time, the complainant was lying on the mattress crying and apparently naked. The complainant testified that upon entering the room, McCullough inserted his penis into the complainant's vagina without her consent. The complainant testified that she did not physically resist McCullough's advances because she was scared and felt defenseless. However, she did ask McCullough to stop. Viewing the evidence in the light most favorable to the prosecution, we conclude that the evidence was sufficient to establish the element of force or coercion beyond a reasonable doubt.

III

Defendant Cameron argues in his appeal that the trial court abused its discretion in denying his motion for an evidentiary hearing to establish that defense counsel was ineffective for reasons other than those discussed above. We agree. Cameron alleges that his attorney told him that neither defendant could testify unless they both agreed to take the stand. In addition, Cameron asserts that defense counsel refused to allow only one defendant to accept the plea agreement. The accused has the ultimate authority to make certain fundamental decisions regarding the case, including whether to plead guilty and whether to testify. *Jones v Barnes*, 463 US 745, 751; 103 S Ct 3308; 77 L Ed 2d 987 (1983). Thus, Cameron should have the opportunity to prove these allegations below.

Defendant McCullough's conviction is affirmed. Defendant Cameron's case is remanded to the trial court for an evidentiary hearing to be held within ninety days so that the two allegations outlined in the preceding paragraph, and only those allegations, can be addressed. We retain jurisdiction.

/s/ David H. Sawyer

/s/ Harold Hood

/s/ Joel P. Hoekstra