STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MAUSHEAD CHARVON SANDERS,

Defendant-Appellant.

UNPUBLISHED
December 2, 1997

No. 190137
Ottawa Circuit
LC No. 94-017957-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TYRELL ALEXIS WALLACE,

Defendant-Appellant.

No. 190141
Ottawa Circuit
LC No. 95-018748-FC

Before: Smolenski, P.J., and MacKenzie and Neff, JJ.

PER CURIAM.

Defendants were convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(d); MSA 28.788(2)(1)(d). Defendant Wallace was sentenced to a prison term of 120 to 300 months and defendant Sanders was sentenced to a prison term of 60 to 180 months. Both defendants appeal as of right. We affirm.

This case involves a sexual assault by these two defendants, who were tried together, and one other who was tried separately. According to the victim's testimony, the three men forced her to perform various sexual acts against her will. The sexual acts occurred in a bedroom of the apartment of a friend of the victim where the victim was living at the time. Defendant Wallace is the friend's brother and the other two men, defendant Sanders and Joseph Washington, were his friends.

I

Wallace - cause no. 190141

A

Wallace first argues that the trial court erred in failing to grant his motion for directed verdict because there was insufficient evidence of coercion. When reviewing the denial of a motion for a directed verdict, we view the evidence in a light most favorable to the prosecution to determine whether the evidence was sufficient to permit a rational trier of fact to find the essential elements of the crime proven beyond a reasonable doubt. *People v Partridge*, 211 Mich App 239, 240; 535 NW2d 251 (1995). Circumstantial evidence and reasonable inferences drawn from it are sufficient to prove the elements of the crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

In a prosecution for first-degree criminal sexual conduct, force or coercion is not limited to physical violence, but is instead determined in light of all the circumstances. MCL 750.520b(1)(f); MSA 28.788(2)(1)(f); *People v Brown*, 197 Mich App 448, 450; 495 NW2d 812 (1992). For example, force and coercion may be found where the accused blocks a victim's path while putting her in reasonable fear of dangerous consequences. *People v Cowley*, 174 Mich App 76, 81-82; 435 NW2d 458 (1989); People v McGill, 131 Mich App 465, 472; 346 NW2d 572 (1984). In addition, force or coercion exists if there is a lack of consent and physical helplessness. *Brown, supra* at 450.

Wallace contends that the trial court did not review the evidence as to each defendant separately and that the evidence about his involvement is insufficient to support a finding of force or coercion by the jury. We disagree.

The victim testified that she told the men that she did not want to have sex with them. Nevertheless, Wallace assisted in keeping the victim in the room with the men. The victim testified that when Sanders came over and sat on the bed and began touching her breasts, Wallace went and stood behind her, in front of the door. The victim also testified that after Washington came into the room, Wallace again stood in front of the door. Furthermore, the victim testified that after Wallace had intercourse with her, he asked whose turn it was next. From these actions, a reasonable jury could infer that the victim felt that she was trapped, or blocked from leaving by Wallace.

Although Wallace may not have used physical violence with the victim, evidence was presented that he used physical force. The victim testified that Wallace put his hands on the back of her shoulders and laid her down on the bed with her front side facing the bed. She testified that she kept repeating that she did not want to have sex with him, but he would not listen. Wallace is approximately 6'1" tall and weighs 200 pounds and the victim is approximately 5'5" tall. From this testimony, a reasonable jury could infer that because of his size and by placing the victim in a position from which it would be difficult for her to resist, Wallace used physical force to engage in sexual intercourse with the victim while she was protesting.

Wallace also contends that based on the victim's consent, the element of force or coercion is vitiated. However, the victim testified that she clearly and repeatedly stated that she did not want to have sexual intercourse with any of the men, creating an issue of fact as to the element of consent. Such matters of witness credibility are to be left to the trier of fact. *People v Velasquez*, 189 Mich App 14, 16; 472 NW2d 289 (1991). The trial court did not err in denying Wallace's motion for directed verdict.

B

Second, Wallace argues that the trial court erred in failing to grant him a new trial based on newly discovered evidence including testimony by Goerke, the victim's friend, and testimony by Robert Wallace, defendant Wallace's father. To justify a new trial on the basis of newly discovered evidence, the moving party must show: (1) that the evidence itself, and not merely its materiality, is newly discovered; (2) that the evidence is not cumulative; (3) that including the new evidence on retrial would probably cause a different result; and (4) that the party could not with reasonable diligence have discovered and produced the evidence at trial. *People v Miller*, 211 Mich App 30, 46-47; 535 NW2d 518 (1995). We review the trial court's decision to grant a new trial for an abuse of discretion. *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993).

The testimony of Goerke that the victim occasionally drinks alcohol and that the victim had engaged in sexual intercourse with people other than her boyfriend does not meet prong number four of the test for evidence warranting a new trial. Goerke testified at the trial after the victim testified about her drinking habits and sexual habits. Defendant did not question Goerke about these portions of the victim's testimony. Goerke was known to defendant as a witness; with reasonable diligence defendant could have discovered and produced this evidence at trial. Furthermore, this testimony is presented for the purpose of impeaching the victim and newly discovered evidence is not a ground for a new trial if it would be used merely for impeachment. *People v Sharbnow*, 174 Mich App 94, 104; 435 NW2d 772 (1989).

Robert Wallace's testimony that the victim gave him a ride home on the night of the incident and she did not appear upset does not meet prongs three and four of the test for evidence warranting a new trial. First, this testimony is cumulative. Lavetta Wallace testified at trial that the victim picked up her father and gave him a ride home and Goerke testified at trial that the victim told her she had given Wallace's father a ride home. Malika Wallace and Lavetta Wallace both testified to the victim's appearance and demeanor immediately after the incident. Additionally, Robert Wallace was known to defendant as a possible witness because he is defendant's father and his involvement was testified to by several defense witnesses. With reasonable diligence, defendant could have discovered and produced Robert Wallace's testimony at trial. Second, we note that this evidence is also being presented for purposes of impeaching the victim, and newly discovered evidence is not a ground for a new trial if it is used merely for the purpose of impeachment. *Sharbnow, supra*. Consequently, the trial court did not abuse its discretion in denying Wallace's motion for a new trial.

C

Next, Wallace argues that the trial court erred by giving an incomplete instruction on consent. Defendant did not preserve this issue for review because he did not object to the instruction of consent that was given by the trial court. Failure to object to jury instructions waives error unless review is necessary to avoid manifest injustice. MCL 768.29; MSA 28.1052, *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993), *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). After a careful review of the record, we find no manifest injustice here.

D

Last, Wallace argues that the prosecutor engaged in misconduct by questioning Sanders about exercising his right to remain silent. Defendant, however, did not specifically object when the prosecutor questioned Sanders about exercising his right to remain silent. Review of allegedly improper prosecutorial remarks is precluded if the defendant fails to timely and specifically object unless failure to review the issue would result in manifest injustice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Here, our failure to provide further review will not result in a miscarriage of justice.

II

Sanders - cause no. 190137

A

Sanders first argues that the admission of Wallace's statements to the police violated his constitutional right to confrontation. Sanders, however, did not preserve this issue for appeal because he failed to object to the admission of statements. We may review a claim that the defendant has failed to preserve, if failure to do so would result in manifest injustice. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994). We have reviewed the record and no manifest injustice occurred.

B

Next, Sanders argues that he was denied the effective assistance of counsel because his attorney failed to move for a mistrial after the admission of Wallace's statements to the police. Sanders did not make a motion for an evidentiary hearing or new trial on the basis of ineffective assistance of counsel, so this issue is preserved only to the extent that the claimed mistakes are apparent on the record. *People v Johnson*, 144 Mich App 125, 130-131; 373 NW2d 263 (1985).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Mitchell*, 454 Mich 145, 147, 167, 560 NW2d 600 (1997). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Stanaway, supra* at 687-688.

Here, Wallace's statements pertaining to Sanders did not prejudice Sanders because the statements were cumulative to the trial testimony of both the victim and Sanders himself. Consequently, even if defense counsel should have objected to the admission of Wallace's statements, Sanders has failed to meet his burden of demonstrating that he was prejudiced by counsel's performance. Sanders was not denied effective assistance of counsel.

C

Last, Sanders argues that the prosecutor, in his closing and rebuttal argument, engaged in misconduct by referring to Wallace's statements to the police. Defendant, however, did not object when the prosecutor made these statements during his closing argument or rebuttal argument. We have reviewed the record and again conclude that no manifest injustice occurred. *Stanaway, supra* at 687.

Affirmed.

/s/ Michael R. Smolenski
/s/ Barbara B. MacKenzie
/s/ Janet T. Neff