

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TYRIQUE ANGELO WALKER,

Defendant-Appellant.

UNPUBLISHED

December 30, 1997

No. 191601

Macomb Circuit Court

LC No.95-001519-FC

Before: Neff, P.J., and Jansen and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(f); MSA 28.788(2)(1)(f). Defendant was sentenced to eight to fifteen years' imprisonment. Following his conviction, defendant moved for a new trial. The trial court denied defendant's motion. Defendant appeals as of right. We affirm.

Defendant was also found not guilty of another count of first-degree criminal sexual conduct, arising from the same incident as his conviction. As his first issue on appeal, defendant argues that the inconsistent verdicts should not stand because they cannot be explained on a rational basis. However, inconsistent verdicts, one of which is an acquittal, do not require reversal of the conviction. *People v Vaughn*, 409 Mich 463, 464-467; 295 NW2d 354 (1980). Each count of the criminal indictment stands alone. *Id.* at 465, citing *Dunn v United States*, 284 US 390; 52 S Ct 189; 76 L Ed 356 (1932). Therefore, defendant's argument has no merit.

Next, defendant argues that the trial court erred in admitting prior bad acts evidence because it was not relevant and was very prejudicial. We disagree.

The decision whether to admit or exclude evidence is within the trial court's discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995). Once a defendant has placed his character in issue, the prosecution may introduce evidence that the defendant's character is not as impeccable as defendant claims. *People v Vasher*, 449 Mich 494, 503; 537 NW2d 168 (1995). In deciding whether to admit other acts evidence, the court must determine under MRE 403 whether the danger of

undue prejudice substantially outweighed the probative value of the evidence. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994).

We find that the court did not abuse its discretion in allowing the prosecutor to question defendant about prior incidences involving his girlfriend and another woman. Defendant placed his character in issue during direct examination when he claimed he had never strangled or physically abused any women and had no prior involvement with the criminal justice system. Under *Vasher*, where the defendant was charged with criminal sexual conduct of his four-year-old granddaughter and two other young girls, the prosecutor was permitted to introduce rebuttal evidence regarding defendant's character and his views regarding sex with family members and young girls. *Id.* at 496, 503. We also find that the danger of undue prejudice of the prior acts evidence did not substantially outweigh its probative value. *VanderVliet, supra*. Defendant raised the issue of his character during his testimony, and his credibility as a witness was an important issue for the jury in this case. In addition, the trial court instructed the jury that defendant was not on trial for his other prior acts.

Defendant also argues that the court erred when it denied him his constitutional right to confront a witness against him. We disagree.

The defendant has a constitutional right to be confronted with the witnesses against him. *People v Lee*, 212 Mich App 228, 257; 537 NW2d 233 (1995). On cross-examination, the prosecutor asked defendant about his girlfriend's allegations that defendant physically assaulted her. Following cross-examination, the trial court refused defendant's request to permit his girlfriend to testify as a rebuttal witness. We find that the court did not err in barring his girlfriend's testimony. Defendant was not on trial for the alleged assaults against his girlfriend. The evidence of his girlfriend's complaints were used to impeach defendant's prior testimony that he had no prior contact with the criminal justice system and had never assaulted or abused a woman. Accordingly, the court did not abuse its discretion in barring the girlfriend's testimony.

Defendant also argues that the prosecutor committed misconduct by failing to provide evidence of defendant's prior bad acts during discovery. We disagree.

The question of discovery in a criminal case is committed to the discretion of the trial court. *People v Lemcool (After Remand)*, 445 Mich 491, 497; 518 NW2d 437 (1994). Thus, we must determine whether the trial court in this case abused its discretion. *Id.* at 498. Under MCR 6.201(A)(4), a party upon request must provide to all other parties any criminal record that the party intends to use at trial to impeach a witness. Pursuant to MRE 404(b)(2), the prosecution must provide reasonable notice before trial, or during trial if the court excuses pretrial notice on good cause, before it may seek to admit evidence of other crimes, wrongs, or acts. *People v Ullah*, 216 Mich App 669, 674; 550 NW2d 568 (1996).

Following defendant's direct examination, the prosecutor gave notice to the court and defendant, outside the presence of the jury, that she intended to introduce evidence of defendant's prior bad acts. The prosecutor indicated to the court that she never intended to introduce the evidence until defendant testified that he had no prior involvement with the criminal justice system and had never

physically strangled or abused a woman. The prosecutor indicated that she had just received the reports that morning and that defendant's counsel knew of their existence. There was no indication in the record that defendant requested information regarding police reports during discovery and there was no discovery order. Defendant had filed a demand for a bill of particulars, but that request did not include police reports from unrelated offenses.

We find that the trial court did not abuse its discretion in admitting the evidence of defendant's prior bad acts despite the fact that defendant was not provided with the police reports before the trial. Defendant never requested the documents pursuant to MCR 6.201(A)(4). Therefore, the prosecution had no obligation to provide them. In addition, the prosecutor did not intend to introduce the prior acts evidence until defendant testified as to his character. As required by MRE 404(b)(2), the prosecutor provided notice to defendant as soon as she intended to introduce the evidence.

Next, defendant argues that the prosecutor committed misconduct during cross-examination by waving papers in front of the jury, giving it the impression that the prosecutor possessed police reports regarding prior bad acts by defendant in her possession. Because defendant did not object to the prosecutor's actions, appellate review of improper prosecutorial conduct is generally precluded. *Ullah, supra* at 679. An appellate court will reverse, however, if a curative instruction could not have eliminated the prejudicial effect of the remarks or where failure to review the issue would result in a miscarriage of justice. *Id.* Accordingly, defendant's argument is without merit.

Finally, defendant argues that the prosecutor failed to introduce sufficient evidence of defendant's guilt and that the jury's verdict was against the great weight of the evidence. We disagree.

In reviewing the sufficiency of the evidence in a criminal case, this Court views all evidence in a light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime have been established. *People v Williams*, 212 Mich App 607, 608; 538 NW2d 89 (1995). A new trial may be granted where the verdict is against the great weight of the evidence. *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993). "Likewise, a new trial may be granted to prevent an injustice." *Id.* To determine whether a verdict is against the great weight of the evidence, or has worked an injustice, a judge must review the whole body of proofs. *Id.*

A person is guilty of criminal sexual conduct in the first degree if he engages in sexual penetration with another person and if the defendant causes personal injury to the victim and force or coercion is used to accomplish the sexual penetration. MCL 750.520b(1)(f); MSA 28.788(2)(1)(f); *People v Asevedo*, 217 Mich App 393, 395; 551 NW2d 478 (1996). There is no dispute that the first element, acts of penetration, occurred between defendant and the victim. Moreover, the victim presented evidence that defendant injured her during those acts.

The third element, the use of force or coercion, was the key issue at trial. The victim testified that defendant forced her to have intercourse. She stated that he repeatedly choked her and told her if she did not do what he wanted, he would kill her. She stated that she tried to escape but defendant choked her again. The victim stated that at no time did she consent to sexual contact with defendant. Viewed in a light most favorable to the prosecution, a rational trier of fact could determine that

defendant forced the victim to have intercourse, and thus the evidence is sufficient to support defendant's conviction of first-degree criminal sexual conduct.

Despite defendant's testimony that the sexual intercourse was consensual and his denial that he choked the victim, we find that based on the victim's testimony and the testimony of the treating physician, the jury's guilty verdict was not against the great weight of the evidence. The task of determining the credibility of witnesses is for the jurors, not the trial judge. *Herbert, supra* at 475. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Affirmed.

/s/ Janet T. Neff

/s/ Kathleen Jansen

/s/ Jane E. Markey