STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GODFREY CADOGAN,

Defendant-Appellant.

UNPUBLISHED
March 3, 1998

No. 188716
Washtenaw Circuit Court
LC No. 95-003679-FH

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

PER CURIAM.

Following a jury trial, defendant was convicted of third-degree criminal sexual conduct, MCL 750.520d; MSA 28.788(4), and assault and battery, MCL 750.81; MSA 28.276. The trial judge sentenced defendant to 1½to 15 years of imprisonment for the CSC conviction and ninety days of imprisonment for the assault conviction. Defendant appeals as of right, and we affirm.

I

Defendant first alleges several instances of ineffective assistance of trial counsel. Effective assistance of counsel is presumed and defendant can only overcome this presumption by demonstrating that counsel failed to perform an essential duty that was prejudicial to the defendant. *People v Sharbnow*, 174 Mich App 94, 106; 435 NW2d 772 (1989).

The first four claims involve trial counsel's conduct during jury selection. First, defendant argues that trial counsel was ineffective for failing to remove biased jurors. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987), and jury selection is such a matter, *People v Robinson*, 154 Mich App 92, 94-95; 397 NW2d 229 (1986). Second, defendant claims that counsel was ineffective for failing to object to a substitute judge taking the jury's verdict. A verdict taken by a substitute judge does not constitute error warranting reversal unless it clearly appears that prejudice to the defendant has resulted. *People v Clyburn*, 55 Mich App 454, 458-459; 222 NW2d 775 (1974). No such prejudice is apparent on the record. Third, defendant claims that counsel was ineffective for failing to challenge the composition of the jury array. Because defendant provides no information regarding the composition of

the array and such

information is not apparent from the record, we need not review this issue. *People v Juarez*, 158 Mich App 66, 73; 404 NW2d 222 (1987). Fourth, defendant argues that counsel was ineffective for conducting sidebar conferences during voir dire with the prosecutor and trial judge outside defendant's presence. Contrary to defendant's contentions, such a practice did not deny defendant his right to be present at all critical stages of the proceeding. *People v Harris*, 133 Mich App 646, 652; 350 NW2d 305 (1984). Accordingly, because counsel's conduct was not improper, defendant has failed to show that he was prejudiced by counsel's performance. *Sharbnow*, *supra* at 106.

The remaining allegations of ineffective assistance of trial counsel involve counsel's conduct during trial. First, defendant maintains that counsel was ineffective for failing to object to the use of CJI2d 20.12(c) because it omits the term "sexual penetration." However, the instruction correctly incorporates the definition of cunnilingus, which is a form of penetration. Second, defendant argues that counsel was ineffective for failing to object to the prosecutor's improper attempt to elicit hearsay testimony. However, the prosecutor was questioning defendant about defendant's own statements, which are not hearsay. See MRE 801(d)(2)(A). Third, defendant claims that counsel was ineffective for failing to move for a directed verdict. This claim is without merit because the record contained sufficient evidence from which a reasonable juror could conclude that the prosecutor established third-degree criminal sexual conduct and assault and battery beyond a reasonable doubt. Last, defendant argues that counsel was ineffective for failing to move for a mistrial after the prosecutor made remarks unsupported by the evidence. As discussed *infra* in Section VII, the prosecutor's comments were supported by the evidence. Again, because counsel's conduct was not improper, defendant has failed to show that he was prejudiced by counsel's performance. *Sharbnow*, *supra* at 106.

II

Defendant also argues that his guarantee against double jeopardy was violated when the trial court added four potential jurors to the venire at the beginning of the jury selection process. Specifically, defendant argues that jeopardy attaches at the beginning of jury selection, when the venire is first sworn. We disagree. Both the United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15; *People v Torres*, 452 Mich 43, 63; 549 NW2d 540 (1996). However, double jeopardy does not attach until the jury is selected and sworn. *People v Mehall*, 454 Mich 1, 4; 557 NW2d 110 (1997). Because the jury had not been selected when the additional prospective jurors arrived, defendant's claim is without merit. Consequently, defendant's claim that counsel was ineffective for failing to object to this procedure is also without merit. *Sharbnow*, *supra* at 106.

III

Defendant also argues that the trial court erred by instructing the jurors to rely on their collective memories in response to the jury's question during deliberations. We disagree. The jury did not request that certain testimony be reread; rather, the jury submitted a factual question. Answering such a question would have been improper for the court. *People v Bonner*, 116 Mich App 41, 45-46; 321 NW2d 835 (1982). Additionally, because the judge did not instruct the jury that it could not have the

trial testimony read to them, future review of the record by the jury was not foreclosed. *Id.* See MCR 6.414(H). Therefore, the court's instruction to the jury was proper.

IV

Defendant also argues that his guarantee against double jeopardy was violated because the jury convicted him of both third-degree criminal sexual conduct and assault and battery. We disagree. Two separate punishable offenses generally exist when each offense requires proof of at least one fact that the other does not. *United States v Dixon*, 509 US 688; 113 S Ct 2856, 2860; 125 L Ed 2d 556, 568 (1993). The essential elements of third-degree criminal sexual conduct are: (1) sexual penetration of the victim (2) achieved by force or coercion. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). The elements of assault and battery are: (1) that the defendant committed a forceful or violent touching of the victim and (2) that the defendant intended to touch the victim. CJI2d 17.2. See, e.g., *People v Terry*, 217 Mich App 660, 662; 553 NW2d 23 (1996). Although both third-degree criminal sexual conduct and assault and battery require proof of force, each offense requires proof of at least one fact that the other does not; therefore, the two offenses do not constitute the same offense.

V

Defendant also argues that the trial court abused its discretion by allowing the prosecutor to dominate voir dire and by making prejudicial remarks during voir dire. However, defendant did not object to any of the alleged errors during voir dire. Moreover, defense counsel expressed satisfaction with the jury and only exercised two of his five peremptory challenges. Therefore, defendant has waived any claim regarding the scope of voir dire. *People v Daniels*, 192 Mich App 658, 666-667; 482 NW2d 176 (1992).

VI

Defendant also argues that the trial court abused its discretion by admitting complainant's statement to a friend after the incident as an excited utterance. We disagree. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). At issue here is whether the prosecution presented independent proof, direct or circumstantial, of the startling event that led to the statement. *People v Burton*, 433 Mich 268, 294; 445 NW2d 133 (1989). Our review of the record reveals that there was sufficient circumstantial evidence of the sexual assault. See, e.g., *People v Kowalak (On Remand)*, 215 Mich App 554, 559-560; 546 NW2d 681 (1996). Complainant testified that she answered the telephone during the incident and told the caller to contact 911 because she was being attacked. The caller verified that she contacted complainant, who answered the telephone and said to call the police. According to the caller, complainant was screaming and crying. Additionally, complainant's friend testified that complainant was crying and upset when complainant called. Complainant's friend explained that when she arrived at complainant's home, complainant was shaking and still upset. Because the record contains independent proof of the startling event that led to complainant's statement, the trial court did not abuse its discretion in admitting the testimony.

VII

Defendant also alleges several instances of prosecutorial misconduct. We limit our discussion to only those four instances that were preserved for appellate review by an objection by defendant because the other alleged instances either did not involve misconduct or involved misconduct that an appropriate instruction could have cured. *People v Turner*, 213 Mich App 558, 575; 540 NW2d 728 (1995). Issues of prosecutorial misconduct are decided on a case-by-case basis, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v LeGrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994).

First, defendant argues that the prosecutor improperly argued during closing argument that complainant informed the police on the night of the incident that oral penetration had occurred. We find that this argument was properly drawn from a police officer's testimony that during the interview after the incident, complainant described the penetration as "kissing." A prosecutor is free to relate the facts adduced at trial to the theory of the case and to argue the evidence and all reasonable inferences arising from it to the jury. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (quoting *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 229 (1989)).

Second, defendant argues that the prosecutor improperly elicited from a lay witness an answer to a hypothetical question. We disagree. A character witness for defendant testified that in her opinion, defendant was not an assaultive person. During cross-examination, the prosecutor asked the witness, over defense counsel's objection, whether her opinion would change if she knew that a woman was upset and that defendant pulled her pants down. The witness responded that if that were true, then it might change her opinion. We find that the witness was merely providing opinion testimony. See MRE 701. Further, the use of a hypothetical question by the prosecutor was not improper. "In order to rely on an opinion given in answer to a hypothetical question, the factual assumption in the hypothetical must be in substantial accord with the evidence accepted at trial." *Gardner v Van Buren Public Schools*, 197 Mich App 265, 273; 494 NW2d 845 (1992), rev'd on other grounds 445 Mich 23; 517 NW2d 1 (1994). Here, defendant denied that he performed cunnilingus on complainant; however, he admitted that during the incident the complainant was screaming, so he pulled her pants down to show her how easy it would be for him to assault her. Because the prosecutor based the hypothetical question to the witness on facts in evidence, the question was proper.

Third, defendant argues that the prosecutor improperly stated during closing argument that a sexual assault charge formerly had to be supported by corroborating evidence. Even if this statement was incorrect, such an error was not prejudicial because the statement addressed past law and the prosecutor was not arguing that the jurors should apply incorrect law. Moreover, when read as a whole and evaluated in light of defense arguments, *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992), the prosecutor's comments were proper because immediately before the prosecutor made the statement, defense counsel argued that defendant should not be convicted of third-degree criminal sexual conduct because there was "no corroboration."

Last, defendant claims that the prosecutor improperly vouched for complainant's credibility by stating the content of her conversation with complainant. We agree that the prosecutor's conduct in this

instance was improper because she was asserting her personal knowledge, *People v Miron*, 31 Mich App 142, 144; 187 NW2d 497 (1971), and testifying to the jury, *People v Brocato*, 17 Mich App 277, 295; 169 NW2d 483 (1969). However, immediately after the prosecutor revealed what she told complainant, the trial court cautioned the jurors to disregard the prosecutor's comments. Jurors are presumed to have followed a court's instructions until the contrary is clearly shown. *People v McAlister*, 203 Mich App 495, 504; 513 NW2d 431 (1994). Here, defendant has failed to demonstrate that the jurors failed to follow the court's instruction to disregard the prosecutor's statements. Accordingly, defendant's claim is without merit.

Affirmed.

/s/ Gary R. McDonald
/s/ David H. Sawyer
/s/ Joel P. Hoekstra