

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JUAN SOLAMON,

Defendant-Appellant.

UNPUBLISHED

March 27, 1998

No. 197629

Recorder's Court

LC No. 95-011835

Before: Young, Jr., P.J., and Michael J. Kelly and Doctoroff, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and second-degree criminal sexual conduct, MCL 750.250c(1)(a); MSA 28.788(3)(1)(a). Defendant was sentenced to concurrent prison terms of ten to fifteen years for the first-degree criminal sexual conduct conviction and two to fifteen years for the second-degree criminal sexual conduct conviction. We affirm.

Defendant first argues that the trial court used an improper standard when ruling on his motion for a new trial, and that the verdict was against the great weight of the evidence. We disagree. To determine whether a verdict is against the great weight of the evidence, or has worked an injustice, a judge necessarily reviews the whole body of proofs and may set aside a perverse verdict and grant a new trial. *People v Herbert*, 444 Mich 466, 475-476; 511 NW2d 654 (1993). When deciding defendant's motion, the trial court accurately cited the court rule which governs motions for new trial, MCR 6.431(b), and correctly applied the court rule finding that the verdict did not result in a miscarriage of justice.

A trial court's denial of a motion for a new trial based on a claim that the verdict was against the great weight of the evidence is reviewed for an abuse of discretion. *People v Harris*, 190 Mich App 652, 658-659; 476 NW2d 767 (1991). An abuse of discretion will be found only if denial of the motion was manifestly against the clear weight of the evidence. *Id.* A trial judge may grant a new trial because he disbelieves the testimony of witnesses for the prevailing party. *Herbert, supra* at 466. Defendant argues that the trial court should have granted a new trial because the complainant and the

complainant's mother were incredible witnesses. However, the complainant's testimony was corroborated not only by her mother's testimony, but also by medical evidence. The doctor testified to what the complainant reported to him on the day of the examination, which was consistent with what the complainant testified to in court and consistent with complainant's injuries. Therefore, the verdicts were not against the great weight of the evidence, and the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Defendant next argues that the trial court prevented him from presenting evidence that the complainant had a motive for falsely accusing him, and that someone else may have been the assailant, specifically complainant's brother. In conjunction with this argument, defendant argues that if this Court finds that the record is insufficient to rule on this matter, this Court should remand the case so defendant can clarify the record and make an offer of proof regarding the evidence he would have presented. This Court has already considered defendant's motion to remand the case to the trial court for the purpose of developing a record on these evidentiary issues, and the motion was denied. Defendant sought leave to bring an interlocutory appeal in the Supreme Court of this Court's denial of the motion. The Supreme Court denied leave on February 27, 1998.

Defense counsel asked the complainant whether anyone else had ever "bothered" her. The prosecution objected. Before the court ruled on the objection, the complainant answered "no." The prosecution also objected to defense counsel's question to the complainant whether she had ever done something for which she was punished, and the trial court sustained the objection. The trial court also sustained the prosecution's objection to defense counsel's question to the complainant's mother regarding alleged sexually inappropriate behavior of the complainant's twenty-two year-old brother. On appeal, defendant argues that the trial court denied him the right to present a defense. We disagree.

To preserve an evidentiary issue for review, a party seeking admission of excluded evidence is obliged to make an offer of proof to provide the trial court with an adequate basis on which to make its ruling and to provide this Court with the information it needs to evaluate the claim of error. MRE 103(a)(2); *People v Grant*, 445 Mich 535, 545; 520 NW2d 123 (1994). The decision to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *People v Romano*, 181 Mich App 204, 218; 448 NW2d 795 (1989). Error may not be predicated on an evidentiary ruling unless a substantial right was affected. MRE 103(a); *People v Travis*, 443 Mich 668, 686; 505 NW2d 563 (1993).

The trial court did not abuse its discretion, and defendant was not deprived of his right to present a defense. Defendant's question to complainant regarding another person being the assailant was answered by complainant after the prosecution objected, however, prior to the court ruling on the objection. Therefore, defendant's argument that he was prohibited from exploring this area is meritless. Further, the objections to defense counsel's questions regarding prior bad acts of complainant and the behavior of complainant's brother were properly sustained. This Court must consider the facts known to the trial court at the time the ruling was rendered. *People v Rockwell*, 188 Mich App 405, 410; 470 NW2d 673 (1991). Considering the questions as they were posed, they were not relevant.

Furthermore, since defendant failed to make an offer of proof, the trial court did not abuse its discretion in excluding the evidence.

Defendant next argues that the trial court abused its discretion by finding the complainant, a child under the age of ten, competent to testify. We disagree. First, defendant failed to object to the trial court's determination that the complainant was competent to testify. Defendant's failure to object to the admission of the testimony waived his right to assert this error on appeal. *People v Garland*, 152 Mich App 301, 309; 393 NW2d 896 (1986). However, even if a timely objection had been made, reversal is not required. A trial court's decision allowing a child witness to testify will not be reversed absent an abuse of discretion. *People v Jehnsen*, 183 Mich App 305, 308; 454 NW2d 250 (1990). The trial court determined that the complainant was competent following questions designed to determine if she had the capacity to testify truthfully, and understood the obligation to testify truthfully. Therefore, the trial court did not abuse its discretion. *Id.*

Finally, defendant argues that he was denied the effective assistance of counsel by defense counsel's failure to object to the trial court's finding the complainant competent to testify. Again, we disagree. In order to prove a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). The defendant must also show that there is a reasonable probability that, but for the deficient performance, the result of the proceeding would have been different and that the result of the proceeding was fundamentally unfair or unreliable. *People v Johnson*, 451 Mich 115, 124 545 NW2d 637 (1996). Because defendant failed to preserve this issue for appeal by moving for a new trial or an evidentiary hearing before the trial court, our review is limited to the record before us. *Barclay, supra* at 672.

As previously stated, the trial court did not err in finding the complainant competent to testify. Because the trial court did not err, defense counsel's failure to object did not effect the outcome of the trial. Further, because the trial court did not err, the criminal proceeding was not fundamentally unfair or unreliable. On this record, defendant has failed to establish that he was denied the effective assistance of counsel.

Affirmed.

/s/ Robert P. Young, Jr.

/s/ Michael J. Kelly

/s/ Martin M. Doctoroff