

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DETRICK DEZELL DAVIS,

Defendant-Appellant.

UNPUBLISHED

May 6, 2004

No. 245592

Oakland Circuit Court

LC No. 2002-182922-FH

Before: Gage, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(b). He was sentenced as an habitual offender, second offense, MCL 769.10, to concurrent prisons terms of 9-1/2 to 22-1/2 years for each conviction. He appeals as of right. We affirm.

I. Underlying Facts

In mid-June 2001, the victim met defendant at a lingerie booth located in a flea market where he offered to pay her \$500 to pose in lingerie. She agreed. During the photo shoot, defendant did not make any sexual comments or advances toward the victim. The next day, the victim returned to the flea market to pick up her money and copies of the photographs. They arrived at defendant's sport utility vehicle (SUV) to retrieve the photographs and money when defendant pushed the victim inside the passenger side and drove to a secluded, wooded area behind the flea market. In the secluded area, the victim testified that defendant pulled her down on the seat and put his penis inside her vagina. The victim testified that she was crying, screaming, and telling defendant to stop. Despite her protests, the victim testified that he then forced her to engage in oral sex. The victim suffered from vaginal bleeding and bruising as a result of the sexual assault, but did not immediately report the crime.

Two days later, the victim lacked energy and was in great pain as a result of the sexual assault. Consequently, she took prescribed pain medication and over-the-counter caffeine pills. A reaction to the drugs caused the victim to be hospitalized. The hospital records indicated that the victim had bruising on her "bilateral lower extremities." Hospital personnel treated the victim and requested that she reside in the psychiatric ward because they inferred that she tried to commit suicide. Approximately one week after her release, the victim reported the sexual assault to her friend and her mother. At the time of the sexual assault, the victim was under the

care of a psychiatrist because of the recent death of her fiancé. The victim was prescribed “anti-depressants and nerve pills” for depression and anxiety by her psychiatrist, but denied that the medications affected her ability to remember or recall the details of the sexual assault. The trial court did not allow the defense to elicit the actual names of the medications, noting that the actual names were meaningless without a foundation through expert testimony.

Defendant gave two statements to police regarding his contact with the victim. In the first statement, defendant admitted photographing the victim, but denied having any physical contact with her. In the second statement, defendant initially denied any physical contact with the victim. Later in the interview, defendant admitted that there was sexual contact with the victim, but maintained that it was consensual. He denied that there was any penetration.

II. Exclusion of Evidence

Defendant first argues that the trial court erred by excluding evidence of the specific names of the prescribed anxiety and depression medications the victim was taking at the time of the alleged sexual assault, thereby denying him his right to present a defense. We disagree. This Court reviews a trial court’s evidentiary rulings for an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *Sabin, supra* at 67.

Under the circumstances of this case, the trial court did not abuse its discretion. *Sabin, supra*. The victim testified that she was taking medication for anxiety and depression before the sexual assault as prescribed by her psychiatrist because of the recent death of her fiancé. The victim further testified that these medications had no impact on her recollection of the sexual assault. Defendant did not retain an expert to contradict the victim’s testimony. Thus, there was no foundation to indicate that the names of the medication had any bearing on the evidence admitted at trial. MRE 401. There was no indication that the delineation of the actual prescribed medications taken by the victim had any bearing on her credibility. Without additional information, providing the specific names of the prescribed depression and anxiety medications would not have a tendency to make it more likely that the victim was perpetuating a lie. In short, defendant failed to persuasively demonstrate how providing the actual names of the medications could have assisted the jury in evaluating the victim’s credibility. MRE 401. Moreover, the inferences defendant was trying to draw between providing the specific names of the prescribed medications and the victim’s testimony being incredible were tenuous and may have confused the issues. MRE 403.

We also reject defendant’s claim that the trial court’s evidentiary ruling deprived him of his constitutional right to present a defense. The trial court’s ruling did not amount to a blanket exclusion of all evidence challenging the victim’s credibility. In fact, defense counsel cross-examined the victim at length, and specifically questioned her regarding her use of the prescribed medications. Moreover, contrary to defendant’s implication, evidentiary rulings do not

ordinarily rise to the level of a constitutional violation. See *Crane v Kentucky*, 476 US 683, 690; 106 S Ct 2142; 90 L Ed 2d 636 (1986). Therefore, we are not persuaded that the trial court abused its discretion by excluding the challenged evidence.¹

III. Failure to Declare a Mistrial

Defendant next argues that the trial court abused its discretion by failing to find that manifest necessity existed to declare a mistrial and, therefore, his convictions must be reversed. Defendant contends that the trial court coerced the jury into finding him guilty by requiring it to continue deliberating even after it was clear that it was deadlocked. We disagree.

After approximately three days of deliberations, during which the jury heard the play back of trial testimony, the jury sent a note indicating that they were having trouble arriving at a unanimous decision. Without objection, the trial court provided the “deadlocked jury” instruction, CJI2d 3.12, and ordered the jury to continue deliberations. Deliberations continued for an additional two days without incident. Then, a note was sent to the trial court indicating that a juror had refused to engage in deliberations, citing potential reprisal by defendant’s family. The trial court gave the deadlocked jury instruction and advised that any decision by the jury was to be based solely on the evidence. The jury continued deliberations.

The next day, a juror sent a note to the trial court asking to be excused from the jury. The trial court wanted to proceed with caution to ensure that any response did not coerce the jury into rendering a verdict. At that time, defense counsel did not formally move for a mistrial, but indicated that a mistrial was appropriate because the jury had reached an impasse. The trial court denied the request and noted its intention to inquire whether further deliberations might be helpful. If the jury indicated that further deliberations would not be helpful, the matter would be revisited with counsel. After taking time to review the applicable case law and after consultation with the attorneys, the trial judge sent the jury the following note:

We are scheduling for next week. Please advise if you intend to continue your deliberations.

Defense counsel informed the court that he had no objection to the wording of the instruction. In response, the jury asked how late they could deliberate that day before deciding whether to return after the weekend. The trial court advised the jury that they could deliberate until 4:30 p.m. Before that time, the jury returned its verdict.

This Court reviews a trial court’s ruling on a motion for a mistrial for an abuse of discretion. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). A trial judge’s

¹ Within this issue, defendant summarily alleged that the trial court abused its discretion by denying his request to have the victim show the jury a scar on her leg. The victim testified that she had a scar from shaving on one of her legs. The defense sought to have the victim show that “her testimony is accurate.” It is unclear what, if any, positive effect the victim showing the scar on her leg could have had on defendant’s case. The trial court’s decision was not an abuse of discretion under the circumstances. *Sabin, supra*.

decision whether to declare a mistrial because a jury is deadlocked is accorded great deference by a reviewing court. See *People v Lett*, 466 Mich 206, 213; 644 NW2d 743 (2002). “Claims of coerced verdicts are reviewed on a case-by-case basis, and all of the facts and circumstances, as well as the particular language used by the trial judge, must be considered.” *People v Malone*, 180 Mich App 347, 352; 447 NW2d 157 (1989). When a jury indicates that it is unable to agree unanimously on a verdict, a court may require the jury to continue deliberations so long as the court’s instructions or actions do not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals, or cause “a juror to abandon his conscientious dissent and defer to the majority solely for the sake of reaching agreement.” See *People v Hardin*, 421 Mich 296, 316; 365 NW2d 101 (1984); *People v Cook*, 130 Mich App 203, 206; 342 NW2d 628 (1983).

Our review of the record indicates that the trial court did not act unreasonably in declining the request for a mistrial, and its supplemental instructions advising the jury to continue deliberating were not coercive. The trial court reasonably believed that the jury would be able to reach a verdict after hearing relevant instructions and discussing the case in the context of those instructions. In fact, throughout most of the jury’s deliberations until shortly before the verdict, defense counsel shared the court’s view. The tenor of the jury’s notes was not that it was hopelessly deadlocked, but that it needed direction on how to proceed, which was provided. Nothing in the court’s remarks and instructions implied that the jury had to deliberate for any specific length of time, return a verdict in a certain amount of time, or had to return a unanimous verdict contrary to their honest beliefs.² The record does not otherwise suggest that the trial court gave any instruction or acted in a manner that would have caused a juror to abandon his or her own conscientious opinion and defer to the decision of the majority solely for the sake of reaching a unanimous verdict. We note that, while the jury seemingly deliberated for six days, some days were not full days, and time was spent listening to tapes from trial and dealing with other matters, such as scheduling. In sum, the trial court did not abuse its discretion by denying defendant’s motion for a mistrial.³ *Griffin, supra*.

IV. Sentence

We reject defendant’s final claim that he is entitled to resentencing because the trial court improperly scored offense variable (“OV”) 3 and OV 11.

² See *People v Vettese*, 195 Mich App 235, 244-245; 489 NW2d 514 (1992) (instruction that jury would be excused for the evening and would return the next morning not coercive because it did not imply that the jury had to return a verdict by a certain time), and *Cook, supra* (trial court’s comment that it would send deadlocked jury home for the evening and have them return the next day to continue deliberations not coercive).

³ Defendant’s reliance on *People v Lett*, 466 Mich 206; 644 NW2d 743 (2002), and *People v Poindexter*, unpublished opinion per curiam of the Court of Appeals, issued January 29, 2002 (Docket No. 202456), is misplaced, because both cases are factually distinguishable from the instant case. Additionally, the decision in *Poindexter* lacks precedential value because it is an unpublished decision, MCR 7.215(C)(1), and further, because the portion of the decision on which defendant relies presents a hypothetical scenario, which is dicta. See *People v Borchard-Ruhland*, 460 Mich 278, 286 n 4; 597 NW2d 1 (1999).

“A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score.” *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring decision “for which there is any evidence in support will be upheld.” *Id.*, quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

The score of ten points for OV 3 (physical injury) was proper. MCL 777.33(1)(d) provides that ten points are to be scored if “[b]odily injury requiring medical treatment occurred to a victim.” Although defendant contends that there was no evidence that the victim suffered any injury, the victim testified that she suffered vaginal bleeding and bruising to her inner thighs. The pain caused her to take prescription medication. This evidence was sufficient to establish that the victim sustained a bodily injury. *Hornsby, supra*. Accordingly, defendant is not entitled to relief on this basis.

Defendant challenges the scoring of twenty-five points for OV 11 (criminal sexual penetration), alleging that he was improperly scored for the two penetrations that formed the basis of his two third-degree criminal sexual conduct convictions. According to defendant, OV 11 should have been scored at zero points because MCL 777.41(2)(c) prohibits the scoring of points for the penetration that forms the basis of an offense and, here, each of the two sexual penetrations was the basis of a separate conviction and, therefore, was not subject to scoring. However, this Court rejected this position in *People v McLaughlin*, 258 Mich App 635, 676; 672 NW2d 860 (2003). Accordingly, defendant is not entitled to resentencing.

Affirmed.

/s/ Hilda R. Gage
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood