

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH LAWRENCE MATCHETT,

Defendant-Appellant.

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UNPUBLISHED

March 11, 2010

No. 289183

Wayne Circuit Court

LC No. 08-009213

Before: Servitto, P.J., and Bandstra and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of fourth-degree criminal sexual conduct, MCL 750.520e(1)(a), and sentenced to three years of probation. He appeals by right. We affirm.

Defendant was convicted of sexually molesting a 14-year-old student while defendant was working as a security guard at the student's school. According to the complainant, she was sitting in a classroom, with her head down on the table, when defendant walked over and rubbed his hand on her right breast. Two of the complainant's friends, who were also in the classroom, corroborated the complainant's account of the incident.

Defendant's sole issue on appeal involves the trial court's denial of his request for a continuance after the jury had been sworn, but before the first witness was called. The record indicates that before the jury was selected, the prosecutor informed the court that an individual from the Detroit Public Schools ("DPS") had been asked to produce any reports or statements from the school's investigation of the incident. The next day, defense counsel informed the court that the DPS investigator, Eleanor McBurroughs, still had not sent the materials. Defense counsel requested a continuance because the materials, if located, might affect his cross-examination of witnesses. The prosecutor stated that a subpoena was being sent for McBurroughs and the file. Defense counsel acknowledged that defendant had provided a written report and had been questioned by the investigator.

The trial court noted that the contents of the file were unknown at that point, and concluded that defendant "shares a large part of the blame" for the failure to obtain the information sooner because he had participated in the investigation and did not tell defense counsel earlier. The court declined to delay the trial on the basis of a theoretical possibility that

the information might be helpful, but explained, "If and when we can unearth the information and get it, if it is findable, then we'll take a look at it and figure out where to go from there."

After the complainant testified, the trial court was informed that the parties had received the DPS investigative materials. The trial court offered to give the parties time to look at the materials before continuing, and they accepted. When the proceedings resumed, the trial court noted that the parties and the trial court had had an extensive conversation about the contents of the investigative file, which included a nurse's statement that the complainant told her that defendant had touched her on the breast, stomach, behind, and the waist. The following colloquy occurred:

*THE COURT:* So I guess if you want to do something with that in cross-examining the complainant, you can because I told her she might be called again.

Is there anything else you would like to do as a result of the newly revealed evidence?

*[DEFENSE COUNSEL]:* Not at this time.

After additional discussions about some of the statements, defense counsel stated that he had not had adequate time to look at the materials and discuss them with defendant "in any great detail." The trial court responded that after two witnesses, there would be a lunch break, which would give defense counsel a chance to look over the materials and talk to defendant. The trial court further stated, "And we'll make sure that you got a chance to give some more thought to this and figure out how to work our way through this." Defense counsel responded, "I appreciate that."

Defense counsel recross-examined the complainant concerning what she had told the nurse. The complainant's friends then testified and defense counsel cross-examined both witnesses concerning statements they provided after the incident. After the jury was excused for lunch, the trial court asked defense counsel what his plan was for the afternoon. Defense counsel responded, "I haven't formulated anything yet in light of everything." The following exchange then occurred:

*THE COURT:* You haven't formulated a plan yet. You're going to take a look at the stuff. If you're going to rest then --

*[DEFENSE COUNSEL]:* Yeah.

*THE COURT:* -- I'll expect you will argue right away.

*[DEFENSE COUNSEL]:* Yeah. I would be prepared to argue. But I'm going to need a minute to look at the stuff I just got.

*THE COURT:* All right. Well, why don't you plan on coming back about 1:30.

*[DEFENSE COUNSEL]:* If I, if I do, it's just probably going to be one or two quick ones. Maybe a quick character witness. Maybe the defendant real quick. That's the worse case scenario.

When the proceedings resumed after the lunch break, defense counsel announced that he intended to rest as soon as the trial continued.

After defendant filed his claim of appeal, he filed a motion to remand to make an evidentiary record to support his appellate issue concerning the denial of a continuance. Defendant submitted a copy of the DPS investigative report in support of his motion. For the first time, defendant noted that the report referenced another student, DB, who purportedly witnessed the incident, but was not mentioned on the record at trial. According to the report, DB stated that she saw defendant approach the complainant and he “began to play in her hair, pulling her arm, just being very hostile with her.” DB’s statement did not mention defendant touching the complainant’s breast. A panel of this Court denied defendant’s motion to remand.

Defendant now argues that the trial court abused its discretion by denying his request for a continuance to enable him to interview and call DB as a witness. He further asserts “he was deprived of a fair trial by the judge’s refusal to allow his lawyer more time to adjust his defense strategy to incorporate the information contained in the newly discovered investigative reports.”

This Court reviews a trial court’s ruling on a defendant’s request for a continuance for an abuse of discretion. *People v Jackson*, 467 Mich 272, 276; 650 NW2d 665 (2002); *People v Coy*, 258 Mich App 1, 17; 669 NW2d 831 (2003).

“A motion or stipulation for a continuance must be based on good cause.” *Jackson*, 467 Mich at 276, citing MCR 2.503(B)(1).

“Good cause” factors include “whether defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments.” [*Coy*, 258 Mich App at 18 (internal citations omitted).]

Where an adjournment is sought on the basis of unavailability of a witness or evidence, MCR 2.503(C) provides, in pertinent part:

(1) A motion to adjourn a proceeding because of the unavailability of a witness or evidence must be made as soon as possible after ascertaining the facts.

(2) An adjournment may be granted on the ground of unavailability of a witness or evidence only if the court finds that the evidence is material and that diligent efforts have been made to produce the witness or evidence.

“Even with good cause and due diligence, the trial court's denial of a request for an adjournment or continuance is not grounds for reversal unless the defendant demonstrates prejudice as a result of the abuse of discretion.” *Coy*, 258 Mich App at 18-19.

In this case, the record discloses that the only time defense counsel requested a continuance was before the DPS report was produced. Thus, the denial of the request must be evaluated in the context of the information available at that time. At that time, the contents of the file were unknown and the availability of the report was uncertain. The trial court was informed that efforts were being made to obtain a copy of the report and indicated that it would

reevaluate the matter if and when the information was obtained. The trial court also noted that defendant “shares a large part of the blame” for the failure to obtain the information sooner because he had participated in the investigation and did not inform defense counsel earlier. Considering the circumstances that existed at the time, the trial court’s decision not to immediately grant a continuance and to reevaluate the matter once more information was obtained was not an abuse of discretion. Further, although defendant had additional opportunities to request a continuance after the information was disclosed, if he believed a continuance was still necessary, he did not do so. Accordingly, there was no error.

Moreover, defendant has not shown that the trial court’s ruling prejudiced him. Defendant argues that he was prejudiced because trial counsel could have interviewed DB, and if her account was favorable, he could have called her as a witness at trial. However, defendant’s speculation that DB *might* have testified favorably is insufficient to establish prejudice. Defendant surmises that DB’s testimony would have been favorable because her statement did not mention seeing defendant touch the complainant’s breast. However, it is possible that DB may not have been in a position to see all of what defendant did with his hands, or that she may not have seen the entire encounter. To establish prejudice from the trial court’s denial of the requested continuance, defendant should have provided an offer of proof, such as an affidavit from DB, summarizing her anticipated testimony. We acknowledge that defendant submitted a copy of the DPS investigative report in support of his motion to remand. However, because the basis for defendant’s claim of prejudice is the loss of an opportunity to call DB as a witness, the account contained in that report is not adequate to show prejudice. Once again, defendant should have presented an offer of proof regarding DB’s actual testimony.

Moreover, if there was prejudice stemming from the trial court’s denial of a continuance when it was requested *before* the DPS report was produced, defendant could have avoided it by renewing the request *after* the report was produced. Instead, defense counsel agreed with the trial court’s proposal to allow him an opportunity to review the report, and when the trial court asked, “Is there anything else you would like to do as a result of the newly revealed evidence?” defense counsel responded, “Not at this time.” Although the trial court and counsel thereafter discussed the report on other occasions, defense counsel never renewed his request for a continuance. Counsel cannot harbor error as an appellate parachute. *People v Shuler*, 188 Mich App 548, 552; 470 NW2d 492 (1991).

Affirmed.

/s/ Deborah A. Servitto  
/s/ Richard A. Bandstra  
/s/ Karen M. Fort Hood