

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT WILLIAM SCHILKE,

Defendant-Appellant.

UNPUBLISHED

June 13, 1997

No. 196859

Berrien Circuit Court

LC No. 95-002737

Before: Young, P.J., and Doctoroff and Cavanagh, JJ.

PER CURIAM.

Defendant was convicted of criminal sexual conduct in the third degree (CSC III), MCL 750.520d(1)(b); MSA 28.788(4)(1)(b), and was sentenced as an habitual offender, second offense, MCL 769.10; MSA 28.1082, to 30 to 280 months' imprisonment. Defendant appeals his conviction as of right. We affirm.

I

Defendant first argues on appeal that the trial court erred by denying his motion to quash the charge of criminal sexual conduct in the first degree (CSC I). Defendant contends that, at the preliminary examination, there was insufficient evidence presented to establish the "personal injury" element of the crime. We disagree.

The victim alleged that while she was at the residence of her friend, Carrie Coffeen, defendant, who was an acquaintance, bound her hands with her belt and had sexual intercourse with her on the living room floor after Coffeen had gone to bed. Defendant was charged with CSC I, MCL 750.520b(1)(f); MSA 28.788(2)(1)(f), which provides that the offense has been committed if defendant engages in sexual penetration with the victim, uses force or coercion to accomplish the penetration, and causes personal injury to the victim. Defendant was ultimately convicted by the jury of the lesser included offense of CSC III, MCL 750.520d(1)(b); MSA 28.788(4)(1)(b). In this case, the only difference between CSC I and CSC III is the personal injury element, which is required only for CSC I. Personal injury is defined by statute as "bodily injury, disfigurement, mental anguish, chronic pain, pregnancy, disease, or loss or impairment of

sexual or reproductive organ.” MCL 750.520a(j); MSA 28.788(1)(j). In this case, the prosecution relied exclusively on “mental anguish” to establish the personal injury element of CSC I.

Mental anguish is not defined by statute, but was defined by our Supreme Court in *People v Petrella*, 424 Mich 221, 227; 380 NW2d 11 (1985), as “extreme or excruciating pain, distress, or suffering of the mind.” However, the Supreme Court specifically rejected the notion set forth in *People v Jenkins*, 121 Mich App 195; 328 NW2d 403 (1982), that mental anguish requires something more than the emotional distress experienced by the “average” rape victim. *Petrella, supra*, at 258-259, 263-268. The Court stated that there is no “normal” or “average” reaction to rape; therefore, the Court concluded that a definition of mental anguish that involves a comparison to the degree of mental distress “normally” suffered by a victim of forcible sexual assault was based on a false premise. *Id.* at 267-268. The Court also provided the following list of factors or types of evidence that have been considered in determining whether mental anguish has been proven beyond a reasonable doubt:

- (1) Testimony that the victim was upset, crying, sobbing, or hysterical during or after the assault.
- (2) The need by the victim for psychiatric or psychological care or treatment.
- (3) Some interference with the victim’s ability to conduct a normal life, such as absence from the workplace.
- (4) Fear for the victim’s life or safety, or that of those near her.
- (5) Feelings of anger and humiliation by the victim.
- (6) Evidence that the victim was prescribed some sort of medication to treat her anxiety, insomnia, or other symptoms.
- (7) Evidence that the emotional or psychological effects of the assault were long-lasting.
- (8) A lingering fear, anxiety, or apprehension about being in vulnerable situations in which the victim may be subjected to another attack.
- (9) the fact that the assailant was the victim’s natural father. [*Id.* at 270-271.]

The Court emphasized that each case must be decided on its own facts, and that no single factor listed above is necessary to a finding of mental anguish. *Id.* Moreover, the list is not exhaustive. *People v Himmelein*, 177 Mich App 365, 376; 442 NW2d 677 (1989).

Considering the factors set forth in *Petrella*, the prosecutor presented adequate evidence at the preliminary examination that the victim had suffered mental anguish to allow the jury to consider the charge of CSC I. The victim testified that the sight of defendant after the sexual assault made her “sick,” and that she began screaming and crying when defendant appeared at Coffeen’s trailer a few days after the assault. The victim testified that even more than a month after the assault, she still had

daily flashbacks to the event. She testified that she could still feel defendant against her face, smell his breath, and hear the things that he said to her. The victim further testified that she felt “ugly” and “dirty” as a result of the assault. To establish that a crime has been committed, the prosecutor need not prove the mental anguish element beyond a reasonable doubt, he must only show “some” evidence of mental anguish. *People v Hill*, 433 Mich 464, 469; 446 NW2d 140 (1989). Moreover, the abuse of discretion standard is very narrow; the result must have been so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias. *People v Wood*, 200 Mich App 283, 288; 504 NW2d 24 (1993). Based on the victim’s testimony at the preliminary examination, the district court did not abuse its discretion in binding over defendant on CSC I.

Defendant claims that his bindover on CSC I constituted error requiring reversal because the jury impermissibly considered the charge of CSC I, which may have resulted in a compromise verdict of CSC III. It is true that a defendant is always prejudiced when a jury is permitted to consider a charge for which insufficient evidence has been presented at trial because a defendant’s chance of acquittal on any valid charge is substantially decreased by the possibility of a compromise verdict. *People v Vail*, 393 Mich 460, 464; 227 NW2d 535 (1975). However, as we concluded above, there was sufficient evidence of mental anguish presented at trial to support presentation of the CSC I charge to the jury; therefore, defendant was not impermissibly subjected to the possibility of a compromise verdict. *People v Daniels*, 192 Mich App 658, 670; 482 NW2d 176 (1992).

II

Next, defendant claims that the trial court abused its discretion in denying defendant’s motion for a mistrial based upon the court’s opening comments to the jury. Defendant did not object at the time the alleged improper comments were made by the trial court. However, on the second day of trial, defense counsel moved for a mistrial based in part upon the now challenged comments. Specifically, defense counsel argued that the court’s comments that people are sometimes too embarrassed to come forward and talk about sexual matters supported the victim’s explanation for why she waited a week to report the incident. On appeal, defendant makes a completely new argument. Defendant now argues that he was unfairly prejudiced because the court drew a direct parallel between itself and defendant; both the trial court and defendant were confronted with accusations of sexually related matters, and both the court and defendant lied by denying those allegations.

To preserve an issue for appeal, a party must timely object and specify the same ground for objection as it asserted on appeal. *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992); *People v Furman*, 158 Mich App 302, 329-330; 404 NW2d 246 (1987). In this case, defendant did not act in a timely manner with respect to the court’s alleged improper comments. Defendant waited until the second day of trial, after the jury had been sworn and the majority of the prosecutor’s case had been presented, before moving for a mistrial. As a result, the court was denied the opportunity to clarify its statements, or otherwise cure any error that was created by its statements. In addition, as discussed above, defendant makes a different argument on appeal than was made before the trial court on defendant’s motion for a mistrial. Therefore, defendant’s claim is unpreserved, and it

will be reviewed only to the extent necessary to prevent manifest injustice. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995).

The trial court's denial of defendant's motion for a mistrial did not result in manifest injustice. Moreover, even if defendant's claim had been properly preserved, the trial court did not abuse its discretion by denying defendant's motion. Taken in its proper context, the trial judge's anecdote was intended to acknowledge and assuage any embarrassment or apprehension felt by the jurors due to the sexual nature of the case. The judge prefaced his story by emphasizing that sex crimes were a "difficult area." The judge admitted that he lied to his classmates about a sexual matter because it was an embarrassing topic. A review of the record indicates that the purpose of the judge's statement was to address the awkwardness of discussing sexual matters in general, not to imply his or defendant's dishonesty. The parallel defendant attempts to draw between the judge's dishonesty concerning a sexual matter and defendant's anticipated dishonesty concerning the alleged crime in this case is attenuated and unmeritorious.

III

Finally, defendant claims that he was denied effective assistance of counsel. To establish that the defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, this Court must find that counsel's representation fell below an objective standard of reasonableness and that the representation so prejudiced the defendant as to deny him a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Defendant first claims that defense counsel was ineffective because he failed to call an expert witness to rebut the testimony of the prosecutor's expert, Paula Durren. Defendant claims that Durren significantly bolstered the victim's credibility by testifying that it was normal for a rape victim not to fight back, not to call out, and to delay in reporting the incident to police. According to defendant, defense counsel's failure to call an expert in rebuttal tipped the scales of credibility in favor of the victim, thereby prejudicing defendant. However, in this case, no *Ginther*¹ hearing was held, and thus review by this Court is limited to mistakes apparent on the record. *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995).

The record does not indicate whether defense counsel attempted to locate an expert whose testimony would have been favorable to defendant. It is possible that defense counsel interviewed one or more experts, but found that their testimony would have been damaging to defendant's case. Based on the record in this case, we cannot say that defense counsel's failure to call an expert fell below an objective standard of reasonableness. Furthermore, the decision whether to call a witness is a matter of trial strategy. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *Id.*

Next, defendant claims that defense counsel's failure to timely move for discovery regarding the prosecution's expert witness constituted ineffective assistance of counsel. Defendant claims that he was further prejudiced by defense counsel's failure to move for a continuance to allow adequate time to

prepare for cross-examination of the prosecutor's expert and the victim. When claiming ineffective assistance due to defense counsel's unpreparedness, a defendant must show prejudice resulting from the lack of preparation. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). The prosecution listed Paula Durren as a witness on January 3, 1996. Defense counsel filed a motion for discovery on April 11, 1996, seven days before trial was scheduled to begin, in which he requested all of the reports prepared by Durren in connection with her treatment of the victim. The hearing on defendant's motion for discovery was not noticed for hearing until April 17, 1996, the day before trial began. On April 18, 1996, the first day of trial, defense counsel received an "Initial Assessment Form" and "Client Information" form that Durren had prepared with respect to the victim.

Assuming, *arguendo*, that defense counsel's delay in requesting the discovery fell below an objective standard of reasonableness, there is no indication that the representation so prejudiced the defendant as to deny him a fair trial. In defendant's reply brief, he lists three specific ways in which he was prejudiced. Defendant claims that the assessment form indicated that the victim only attended one counseling session and canceled a second session. Defendant argues that counsel should have used that information to question the victim or Durren regarding the victim's need for counseling, which was relevant to the mental anguish element of CSC I. However, the prosecutor and defense counsel did elicit testimony from the victim that she only saw Durren on one occasion. Furthermore, during defense counsel's cross-examination of Durren, he brought out that the victim did not appear for her second appointment with Durren, and that she did not reschedule the appointment. In addition, defendant was not convicted of CSC I, and thus the jury necessarily found that the victim did not suffer mental anguish. Thus, any error was harmless.

Defendant further claims that defense counsel should have used the assessment form for impeachment purposes because it contained information that was inconsistent with the victim's trial testimony. The assessment form states in two places that the incident took place on June 19, 1995, while the victim testified that the incident took place on June 16, 1995. However, the date and events leading up to the alleged incident were never disputed by defendant in this case, and thus, it was not unreasonable for defense counsel not to impeach the victim on that basis. The second inconsistency cited by defendant is that the assessment form indicated that the victim's hands were bound with "his" belt, while the victim testified that defendant bound her hands with "her" belt. Although defense counsel could have impeached the victim on that detail of her story, this Court believes that the lack of cross-examination on that point did not unfairly prejudice defendant.

Finally, defendant claims that counsel's failure to move for dismissal of the CSC I charge at the close of the prosecution's case-in-chief constituted ineffective assistance of counsel, when there was insufficient evidence of personal injury. Defendant argues that although he was convicted of CSC III, counsel's failure to remove the greater charge from the jury's consideration unfairly prejudiced defendant because it increased the likelihood of a compromise verdict. However, we find that, at trial, there was sufficient evidence of mental anguish to prove "personal injury" to the victim, and thus it was not error to allow the jury to consider the charge of CSC I.

Counsel is not required to argue a frivolous or meritless motion. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Therefore, defense counsel's failure to move for a directed verdict did not fall below an objective standard of reasonableness.

Affirmed.

/s/ Martin M. Doctoroff

/s/ Mark J. Cavanagh

/s/ Robert P. Young, Jr.

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).