

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHERARD MAURICE DALTON,

Defendant-Appellant.

UNPUBLISHED

May 13, 2008

No. 273686

Washtenaw Circuit Court

LC No. 05-000337-FH

Before: Wilder, P.J., and O’Connell and Whitbeck, JJ.

PER CURIAM.

A jury convicted defendant Sherard Dalton of third-degree criminal sexual conduct (CSC).¹ The trial court sentenced Dalton as a second offense habitual offender² to 96 to 270 months’ imprisonment. Dalton appeals as of right. We affirm.

I. Basic Facts And Procedural History

The jury convicted thirty-four-year-old Dalton of sexually assaulting a 15-year-old girl. The girl’s classmate met Dalton on a telephone chat line, and the girl and Dalton subsequently exchanged telephone calls. The girl testified that on December 11, 2004, Dalton requested that she meet him at a bowling alley. When the girl arrived, she and Dalton briefly went into the bowling alley before walking to Dalton’s apartment. After arriving at the apartment, Dalton gave the girl a glass of vodka, and the girl and Dalton watched a movie and smoked marijuana. Eventually, the girl became dizzy and “passed out.” When the girl regained consciousness, Dalton was “having sexual intercourse with [her].” The girl explained that Dalton’s penis was in her vagina, her pants were on the floor, and her underwear was around her ankle. She pushed Dalton, and he eventually “got off of [her].” Dalton and the girl briefly argued, and Dalton walked her to the bowling alley and left.

The girl walked to a bus stop and a bus driver called for assistance after hearing that the girl had been raped and observing that she was “distraught, crying, off balanced.” The girl was transported to the Ypsilanti police station where a police officer noted that she was crying, upset,

¹ MCL 750.520d(1)(a).

² MCL 769.10.

and appeared intoxicated. The girl took a Breathalyzer sometime after 7:00 p.m., which registered a blood alcohol level of 0.07 grams per 100 milliliters. For jurisdictional reasons, the case was transferred to a Washtenaw sheriff's deputy, who also noted that the girl had been crying and appeared intoxicated. He directed the girl's mother to transport the girl to the hospital. A nurse practitioner who saw the girl at about 10:30 p.m. testified that the girl appeared intoxicated and struggled to stay awake. The nurse practitioner postponed a sexual assault examination, but ordered a blood-alcohol test, a urine drug screen, and a urine specimen for gamma hydroxybutyric acid (GHB). The lab results were negative for marijuana and GHB, and showed a blood alcohol level of 0.025 grams per 100 milliliters. The girl was examined the following morning. The nurse practitioner found no physical evidence of sexual assault and noted that she could not give an opinion regarding whether a sexual assault occurred.

II. Ineffective Assistance of Counsel

A. Standard Of Review

Dalton argues that he was denied the effective assistance of counsel at trial. Because Dalton failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, we limit our review to mistakes apparent on the record.³

B. Applicable Legal Principles

“Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.”⁴ To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different.⁵ A defendant must also overcome the presumption that the challenged action or inaction was trial strategy.⁶

C. The Victim's Credibility

Dalton claims that defense counsel was ineffective for failing to “properly and fully attack” the girl's credibility regarding her claim that she had smoked marijuana with Dalton. We disagree.

During direct examination, the girl testified that she smoked marijuana that Dalton provided to her. And on direct examination, a medical technologist testified that the lab report containing the test results from the alcohol and drug tests taken on the evening of the attack were

³ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

⁴ *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

⁵ *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *Effinger, supra* at 69.

⁶ *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

positive for alcohol. The prosecutor did not question the technologist about the presence of marijuana. On cross-examination, however, defense counsel elicited testimony that the girl tested negative for marijuana. Further, at the beginning of his closing argument, defense counsel stated:

Did she take Marijuana or didn't she take marijuana?

Well, *the medical reports said she didn't, she was very clear today that she said she did.* Well, I mean, you know, People get fired for saying they didn't smoke dope and there is Marijuana on their test. *They did a test and she hadn't taken Marijuana.* She very clearly stated today that she had taken Marijuana. *That's a lie.* [Emphasis added.]

Subsequently, defense counsel asserted:

You know, let's be very straightforward here. What do you really know? What do you know for sure? *We know that [the victim] lied, lied about using Marijuana that day.* And we know that because *you have a test report that says she didn't have it in her system.* And she told you that she had it. [Emphasis added.]

Therefore, it is clear from defense counsel's questions and closing remarks that he did in fact attack the credibility of the girl regarding her claim that she used marijuana. It is equally clear that the jury was aware of the contradictory test results. Dalton acknowledges defense counsel's argument, but asserts that he should have further questioned the technologist about the contents of the lab report and should have referred the jury to the exhibit during closing argument. But defense counsel's decisions concerning what questions to ask and how to argue the evidence to the jury were matters of trial strategy, which this Court will not evaluate with the benefit of hindsight.⁷ "The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel."⁸

D. Hearsay

Dalton also contends that defense counsel was ineffective for failing to object to hearsay testimony from the nurse practitioner, in which she recounted the girl's statements to her detailing the sexual assault.⁹ We disagree.

⁷ *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

⁸ *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

⁹ In his brief, defendant argues that the testimony was not admissible under the excited utterance exception, MRE 803(2). Plaintiff does not argue, however, that the excited utterance exception permits the admission of the nurse practitioner's statements.

Hearsay, which is a statement other than one made by the declarant while testifying at the trial or hearing offered to prove the truth of the matter asserted, is inadmissible at trial unless there is a specific exception allowing its introduction.¹⁰

[T]here is an exception for statements made for purposes of medical treatment or medical diagnosis in connection with treatment. Under MRE 803(4), the declarant must have a self-interested motivation to speak the truth to treating physicians in order to receive proper medical care, and the statement must be reasonably necessary to the diagnosis and treatment of the patient.^[11]

Here, the girl's statements to the nurse practitioner described the circumstances of the sexual assault. The girl was 15 years old when she made the statements, indicating a sufficient level of maturity for her to understand the necessity of honesty.¹² Further, the nurse practitioner testified that the purpose of the examination was "to help guide [the] medical treatment." Under these circumstances, we conclude that the nurse practitioner's testimony regarding the girl's statements made during the sexual assault examination was admissible under MRE 803(4). And, because the testimony was admissible, defense counsel was not ineffective for failing to object.¹³

III. Prosecutorial Misconduct

A. Standard Of Review

Dalton argues that he is entitled to a new trial because the prosecutor made an improper civic duty argument. Because Dalton failed to object to the prosecutor's remarks, we review this claim for plain error affecting substantial rights.¹⁴ "No error requiring reversal will be found if the prejudicial effect of the prosecutor's conduct could have been cured by a timely instruction."¹⁵

B. Appeal To Jurors' Civic Duty

Dalton contends that the prosecutor impermissibly appealed to the jurors' civic duty when he made the following emphasized comment during closing argument:

Your job is to decide the facts of the case; *to hold the defendant responsible*. He made the decision on December 11, 2004, and in making that decision he broke the law. He sexually assaulted a 15-year-old girl. He provided

¹⁰ MRE 801; MRE 802.

¹¹ *People v McElhaney*, 215 Mich App 269, 280; 545 NW2d 18 (1996) (citation omitted).

¹² See *id.* ("Children over the age of ten are presumed to be reliable.").

¹³ See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) ("Trial counsel is not required to advocate a meritless position.").

¹⁴ *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

¹⁵ *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), abrogated in part on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

her with alcohol, he told her she was pretty, he gave her Marijuana, all for what he wanted; he wanted to sexually assault her. That's why he invited her over. [Emphasis added.]

Prosecutors should not resort to civic duty arguments that appeal to the prejudices of jurors.¹⁶ However, a prosecutor is free to argue reasonable inferences arising from the evidence as they relate to his theory of the case.¹⁷

Viewed in context, the prosecutor's remark did not improperly suggest that the jury should convict Dalton on the basis of civic duty, but rather on the basis of the properly admitted evidence. The prosecutor's comments were made during closing argument and occurred before a lengthy and detailed discussion of the evidence. Moreover, the remarks were isolated and were not so inflammatory that Dalton was prejudiced.¹⁸ Furthermore, in its final instructions, the trial court instructed the jurors that they should not be influenced by prejudice, that the case should be decided on the basis of the evidence, and that they were to follow the trial court's instructions. The instructions were sufficient to dispel any possible prejudice.¹⁹ "Jurors are presumed to follow their instructions[.]"²⁰ Consequently, this claim does not warrant reversal.

C. Ineffective Assistance Of Counsel

Within this issue, Dalton argues that defense counsel was ineffective for failing to object to the prosecutor's comment. But because the prosecutor's comment was not improper, defense counsel was not ineffective for failing to object.²¹

IV. Dalton's Supplemental Brief

Dalton raises several issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-4, Standard 4, none of which have merit.

A. Sufficiency of the Evidence

(1) Standard Of Review

Dalton argues that there was insufficient evidence to sustain his conviction. A claim of insufficiency of the evidence invokes a defendant's constitutional right to due process of law, which we review de novo on appeal.²²

¹⁶ *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

¹⁷ *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996).

¹⁸ See *People v Mayhew*, 236 Mich App 112, 122-123; 600 NW2d 370 (1999).

¹⁹ *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001).

²⁰ *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

²¹ *Snider*, *supra* at 425.

²² *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

(2) Applicable Legal Principles

When ascertaining whether sufficient evidence was presented at trial to support a conviction, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.²³ Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime.²⁴ “[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict.”²⁵

(3) Analysis

As applicable to this case, the elements of third-degree CSC are that Dalton engaged in sexual penetration with another person, and the other person was at least 13 and under 16 years of age.²⁶ “Sexual penetration” is defined as “sexual intercourse, . . . or any other intrusion, however slight, of any part of a person’s body”²⁷

We conclude that, when viewed in a light most favorable to the prosecution, the evidence was sufficient to permit a rational trier of fact to find that Dalton committed third-degree CSC. There is no dispute that the girl was 15 years old at the time of the charged incident. The “sexual penetration” element was satisfied by the girl’s unequivocal testimony that Dalton put his penis in her vagina during sexual intercourse. From this evidence, the jury could reasonably conclude that Dalton sexually assaulted the girl. Dalton argues that the evidence was insufficient because the girl was not credible, and “[t]here was no evidence to prove that penetration occurred.” Dalton’s argument requires this Court to ignore the girl’s testimony and resolve credibility issues anew on appeal. However, it is well established that absent compelling circumstances, which are not present here, a witness’s credibility is for the jury to determine.²⁸ Further, there is no requirement that physical evidence or eyewitnesses corroborate the girl’s testimony. Rather, a girl’s uncorroborated testimony is sufficient to convict a defendant of CSC.²⁹ Consequently, the evidence was sufficient to sustain Dalton’s conviction of third-degree CSC.

²³ *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

²⁴ *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996).

²⁵ *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

²⁶ MCL 750.520d(1)(a).

²⁷ MCL 750.520a(p).

²⁸ See *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998).

²⁹ MCL 750.520h.

B. Great Weight of the Evidence

(1) Standard Of Review

Dalton argues that his conviction is contrary to the great weight of the evidence. Because Dalton failed to preserve this issue by raising it in a motion for a new trial, we review the issue for plain error affecting substantial rights.³⁰

(2) Applicable Legal Principles

In evaluating whether a verdict is against the great weight of the evidence, the question is whether “the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand.”³¹ A verdict may be vacated only when it “does not find reasonable support in the evidence, but is more likely to be attributed to causes outside the record such as passion, prejudice, sympathy, or some extraneous influence.”³² Conflicting testimony and questions regarding the credibility of witnesses are not sufficient grounds for granting a new trial.³³ Indeed, “unless it can be said that directly contradictory testimony was so far impeached that it ‘was deprived of all probative value or that the jury could not believe it,’ or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury’s determination.”³⁴

(3) Analysis

For the reasons discussed in part IV(A), the verdict is not against the great weight of the evidence. The evidence does not clearly preponderate so heavily against the verdict that a miscarriage of justice will result if the verdict is allowed to stand.³⁵

C. Prosecutorial Misconduct

(1) Standard Of Review

Dalton argues that the prosecutor knowingly presented the girl’s false testimony that she smoked marijuana on the day of the incident. Because Dalton failed to object to the prosecutor’s conduct, we review this claim for plain error affecting substantial rights.³⁶

³⁰ *Carines, supra*; *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003).

³¹ *Lemmon, supra* at 627.

³² *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993), quoting *Nagi v Detroit United Railway*, 231 Mich 452, 457; 204 NW 126 (1925).

³³ *Lemmon, supra* at 643.

³⁴ *Id.* at 644-646 (citation omitted).

³⁵ See *id.* at 627.

³⁶ *Carines, supra*.

(2) Applicable Legal Principles

A prosecutor may not knowingly use false testimony to obtain a conviction.³⁷ The prosecutor must also correct false evidence.³⁸ Absent proof that the prosecutor knew that trial testimony was false, however, reversal is unwarranted.³⁹ A new trial is required only if there is a reasonable likelihood that false testimony could have affected the verdict.⁴⁰

(3) Analysis

First, Dalton has not shown that the girl's testimony was actually *false*. There was no evidence, for example, of how much marijuana the girl allegedly consumed, or the specifics and reliability of the urine drug test, which was administered several hours after the incident. Without more information, the negative test results do not conclusively indicate that the girl's testimony was false. In addition, the trial court admitted the lab report into evidence, and the jury was aware of the contradictory test results. Under the circumstances, Dalton's challenge to the girl's testimony that she smoked marijuana involves a matter of witness credibility, which was for the jury to decide.⁴¹ Because there is no tangible indication that the prosecutor engaged in any misconduct, Dalton has failed to demonstrate plain error. Consequently, reversal is not warranted on this basis.

D. Qualified Jury

(1) Standard Of Review

Dalton argues that he is entitled to a new trial because one of the jurors was not qualified to serve. Because Dalton failed to object to the juror's qualifications, we review this claim for plain error affecting substantial rights.⁴²

(2) Analysis

During voir dire, a prospective juror indicated that he resided in Northville. Defense counsel did not object and expressed no dissatisfaction with the impaneled jury. Observing that Northville is in Wayne County, Dalton now argues that the juror was not qualified to serve pursuant MCL 600.1307a(1)(a), because he was not "a resident in the county for which [he was] selected." Dalton has not provided factual support that the juror's actual address was not in Washtenaw County. Furthermore, MCL 600.1354(1) provides that if there is a failure to comply with MCL 600.1307a, it "shall not . . . affect the validity of a jury verdict unless the party . . . claiming invalidity has made timely objection and unless the party demonstrates actual prejudice

³⁷ *People v Lester*, 232 Mich App 262, 276-277; 591 NW2d 267 (1998).

³⁸ *Id.*

³⁹ *People v Herndon*, 246 Mich App 371, 417-418; 633 NW2d 376 (2001).

⁴⁰ *Lester*, *supra* at 280.

⁴¹ See *Lemmon*, *supra* at 642.

⁴² *Carines*, *supra*.

to his cause and unless the noncompliance is substantial.” In light of Dalton’s untimely objection and failure to demonstrate prejudice, we reject this claim of error.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Peter D. O’Connell
/s/ William C. Whitbeck