

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN V. PEOPLES, a/k/a NOEL JAMISON,

Defendant-Appellant.

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UNPUBLISHED

December 26, 2000

No. 214106

Wayne Circuit Court

Criminal Division

LC No. 97-008916

Before: Smolenski, P.J., and Holbrook, Jr. and Gage, JJ.

PER CURIAM.

Defendant was convicted by a jury of three counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(e); MSA 28.788(2)(1)(e), and possession of a firearm during the commission of a felony, MSA 750.227b; MSA 28.424(2). He was sentenced to 40-60 years' imprisonment for the first CSC count, 45-70 years' imprisonment for the second CSC count, and 50-100 years' imprisonment for the third CSC count, each of those sentences to be served concurrently, but consecutive to a two year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court improperly bolstered the prosecutor's case during voir dire. We disagree.

[T]he trial court has considerable discretion in both the scope and conduct of voir dire. What constitutes acceptable and unacceptable voir dire practice "does not lend itself to hard and fast rules." Rather, trial court's must be allowed "wide discretion in the manner they employ to achieve the goal of an impartial jury." [*People v Sawyer*, 215 Mich App 183, 186-187; 545 NW2d 6 (1996) (internal citations omitted).]

During voir dire, the prosecutor inquired about whether the potential jurors believed that the prosecution needed to produce an actual gun at trial in order to prove that a gun was used during the commission of the charged CSC crimes. Defendant concedes that this was a valid area of inquiry. The trial court joined in the voir dire with regard to this particular issue. Upon questioning, one of the jurors expressed confusion about the concept of whether testimony alone, if believed, was sufficient to prove an element of the crime. More specifically, the potential juror was confused about whether defendant could be convicted for using a gun based only on

testimony that a gun was used. The trial court was concerned that the jurors understand the concept that testimony is evidence, which if believed may be used to prove the elements of a crime. Throughout the remaining voir dire, the trial court asked newly seated jurors whether they believed that a gun needed to be produced by the prosecution in order for it to prove that a gun was used.

When the trial court's voir dire questions are reviewed in context, it is clear that the trial court's questioning was not biased and that it did not bolster the prosecution's case. The court's questioning was prompted by the prosecutor's valid inquiry and by subsequent juror confusion about the concept that testimony is evidence. In pursuing voir dire on the issue, the trial court never indicated that the victim's testimony had to be believed or that it should be believed. Rather, the trial court indicated that *if* it was believed, the jury could find that a gun was used. The trial court's questions were neutral and designed only to determine if potential jurors understood a key concept with regard to the evidence. Therefore, we find that the questioning did not improperly bolster the prosecution's case or deprive defendant of a fair trial.

Defendant next argues that the trial court improperly admitted DNA evidence, which was revealed for the first time on the third day of trial. Defendant argues that the DNA evidence was a surprise and that the trial court's admission of the evidence without allowing defendant to consult an expert and prepare to meet the evidence denied him a fair trial and the right to present a defense. We disagree and note that defendant's argument actually entails two separate evidentiary issues, which defendant confuses and entwines.

On the first day of trial, the prosecution moved to add a laboratory analyst to its witness list. The prosecutor indicated that the laboratory analysis of the rape kit evidence was recently completed. Defense counsel had been notified of that fact early the previous week. The prosecution stated that the new witness would testify about what the laboratory analysis revealed. The prosecution was unaware of any DNA evidence at that time and was concerned only with the rape kit evidence. Defendant's counsel did not object to the addition of the laboratory analyst to the prosecution's witness list and did not object to her potential testimony. Defendant's counsel indicated that any results, including DNA results, would not be a surprise given that defendant's defense was that there sexual relations between him and the victim had been consensual. Thus, any finding which supported the conclusion that sexual relations had occurred was not objectionable. At that time, the trial court pointed out to defendant's counsel that if defendant was denying anal penetration and sperm was found in the rectum, there was a potential issue that needed to be investigated. The trial court invited defense counsel to review the laboratory report, talk to the witness, and, if necessary, make objections. Defendant never made any objections to the laboratory evidence or the witness.

On the third day of trial, the prosecutor informed the trial court that the DNA analysis had been unexpectedly finished and the results were available. He asked that the laboratory analyst be allowed to testify to the DNA results. At that point, defense counsel objected. He argued that the DNA evidence, particularly as it concerned the rectum, was a surprise and that he wished to consult an expert. The trial court denied defendant's request, allowed the evidence, and gave defense counsel suggestions for defending against evidence that defendant's sperm was found

within the victim's rectum. The trial court believed that an argument could be made that the sperm found in the rectum migrated to the rectal area after the vaginal intercourse.

Later, testimony from both the laboratory analyst and the emergency room physician, who took the rape kit samples, refuted any theory that sperm could have migrated from the vaginal area into the rectum. The laboratory analyst testified that the rape kit sample from the rectum showed the presence of sperm. The DNA of the sperm was matched to defendant. The emergency room physician then testified that the sperm was most likely ejaculated into the rectum and that the sample was taken from 1-½ inches inside of the victim's anus. This testimony supported the conclusion that there was anal penetration.

Defendant later moved for a mistrial. Although defendant argued that his motion for mistrial was based on the DNA evidence, it was clear that it was the rape kit evidence and the emergency physician's testimony that were the catalyst for the motion. In moving for a mistrial, defendant stated that his concern was with the location of the sperm in the rectum and the need for an "independent doctor . . . that may have been able or may have offered a different opinion as to whether or not this would have been sperm from the vaginal [sic], that went into the anal area." Defendant argued that "when the doctor testified that the sphincter muscle kept out the sperm and its impossible for sperm to come into the anal area, that changed the complexion of the trial." Defendant's true contention did not therefore involve the DNA evidence itself. The trial court was not fooled by defendant's attempt to twist the issue of the DNA evidence with the issue of the laboratory evidence. The trial court did not grant a mistrial, finding that there was no surprise to defendant with regard to the rape kit evidence and that the DNA evidence was basically insignificant.

On appeal, defendant makes the same argument to this Court that he made in the trial court. While defendant argues that the DNA should not have been admitted and its admission requires reversal, his true bone of contention is the finding of sperm in the victim's rectum and the emergency physician's testimony about how the sperm got there. A review of the record reveals that the rape kit evidence was properly admitted. Defendant was aware before the beginning of trial that anal penetration was an issue, that rectal swabs were taken on the day of the incident as part of the rape kit, and that the laboratory analysis of the swabs was completed. Further, the emergency physician was on the prosecutor's witness list and could have been interviewed before trial with regard to how the rectal swabs were taken and how sperm could have entered the rectum. Therefore, any issues with regard to the location of the sperm in the rectum, including how it could have gotten there, were discoverable and were within defendant's contemplation before trial. The evidence was clearly admissible and was not a surprise. There was no other ground that could be used to challenge it. Its admission was not error and the trial court properly refused to grant a mistrial based on it.

Defendant fails to address the DNA evidence by itself or to analyze its admissibility without entwining it with the rape kit evidence. Like the trial court, we find that the DNA evidence itself was insignificant. Even if the admission of that evidence was improper, it was not outcome determinative and thus, it would not constitute error requiring reversal. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). The DNA evidence did not support the conclusion that anal penetration occurred. It only supported a conclusion regarding the

perpetrator's identity. The anal penetration was supported by the properly admitted evidence that sperm was found in the victim's rectum, that it was most likely ejaculated into the rectum and that the victim suffered pain when defendant tried to insert his penis into her rectum. Because the admission of the DNA evidence itself was not prejudicial, it does not constitute error requiring reversal and thus, the trial court did not abuse its discretion in declining to grant defendant a mistrial based on that evidence.

Defendant next argues that the trial court denied him a fair trial when it expressed a congenial attitude toward the victim while expressing a hostile attitude toward defendant. "A party who challenges a judge on the basis of bias or prejudice bears a heavy burden of overcoming the presumption of judicial impartiality." *B & B Investment Group v Gitler*, 229 Mich App 1, 17; 581 NW2d 17 (1998). Defendant needs to show a "deep-seated favoritism or antagonism that would make fair judgment impossible." *Schellenberg v Rochester, Michigan, Lodge No 2225 of Benevolent and Protective Order of Elks of USA*, 228 Mich App 20, 39; 577 NW2d 163 (1998).

A defendant in a criminal trial is entitled to a neutral and detached magistrate. The test is whether partiality could have influenced the jury to the detriment of the defendant's case. Judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases do not generally support a challenge for partiality. Moreover, partiality is not established by expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women sometimes display. [*People v McIntire*, 232 Mich App 71, 104-105; 591 NW2d 231 (1998) (internal citations omitted).]

In this case, the trial court made one remark which could potentially be perceived as hostile to defendant. That remark was made when defendant asked for a drink of water while he was being cross-examined by the prosecutor. Even if the isolated comment by the judge toward the defendant was an expression of hostility, it did not demonstrate that the trial court had a bias against defendant. The trial court's comment did not show a deep-seated favoritism or antagonism that would render a fair trial impossible. Moreover, immediately after making the comment, the prosecutor requested a bench conference to discuss another matter and the trial court recessed to allow defendant and the jury to obtain water. Further, we disagree that the one comment, when viewed in conjunction with the trial court's treatment of the victim and other witnesses, leads to a finding that the trial court was biased against defendant. The trial court was outwardly polite not only to the victim but also to the other witnesses. With the exception of the one instance set forth above, the trial court was respectful to defendant. Defendant therefore has not demonstrated that the trial court's treatment of him denied him a fair trial.

Similarly, we do not find that any other conduct of the trial court deprived defendant of a fair trial. A defendant is not denied a fair trial when a trial court questions witnesses or makes comments so long as the questions are posed in a neutral manner and the comments and questions neither add to nor distort the evidence. *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996). A trial court may not, however, assume the prosecutor's role. *Id.* at 51.

While a trial court may question witnesses to clarify testimony or elicit additional relevant information, the trial court must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial. The test is whether the judge's questions and comments may have unjustifiably aroused suspicion in the mind of the jury concerning a witness' credibility and whether partiality quite possibly could have influenced the jury to the detriment of the defendant's case. [*People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996) (citations omitted).]

Our review of the record reveals that the trial court's conduct was appropriate. The trial court did not rebuke or make disparaging remarks to defendant's counsel. In addition, with the exception of the one comment directed to defendant, the trial court did not demonstrate a marked impatience in the presence of the jury to defendant or his counsel. There was no evidence that the trial court had a deep seated favoritism for the prosecution. Moreover, we find that the trial court's active participation in the case was not excessive and its questioning was neutral, detached and appropriate for the situation. In sum, we are entirely unconvinced by defendant's argument that the trial court's conduct in this case was inappropriate. There was no judicial misconduct in this case and reversal on that ground is not warranted.

Defendant next argues that the trial court abused its discretion when it denied his motion for a mistrial after the prosecutor improperly impeached defendant using a misdemeanor theft offense. We disagree.

During cross-examination, the prosecutor asked defendant about a conviction for second-degree retail fraud. Defense counsel did not object. When defendant was finished testifying, defense counsel questioned whether misdemeanor offenses could be used for impeachment under MRE 609. The next day, the parties and the court agreed that the impeachment had been improper. However, the evidentiary error was not preserved by defendant because he failed to contemporaneously object. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). "Requiring a contemporaneous objection provides the trial court 'an opportunity to correct the error, which could thereby obviate the necessity of further legal proceedings and would be by far the best time to address a defendant's constitutional and nonconstitutional rights.'" *Id.* at 764-765, quoting *People v Grant*, 445 Mich 535, 551; 520 NW2d 123 (1994). We find that the unpreserved evidentiary error does not require reversal in and of itself because, although there was a plain error, it was not decisive of the outcome. *Carines, supra* at 763-764.

Although this case involved a credibility contest between the victim and defendant, the evidence that defendant committed retail fraud, in the face of other evidence, did not affect the outcome of the case. The victim's testimony alone supported a conclusion that she was raped. In addition to her testimony, there was additional corroborating evidence. A witness testified that she saw the victim dressed inappropriately and crying immediately after the alleged attack. The emergency room doctor testified that the victim expressed significant pain when a speculum was inserted into her vagina and that this supported her claim of trauma to that area. In addition, the victim's face was puffy where she claimed defendant hit her. Further, defendant denied anal penetration but sperm was found inside the victim's rectum and testimony indicated that it was ejaculated into the rectum. Thus, there was strong evidence that defendant was not credible on

that issue, and there was also independent evidence that the victim was raped. Because of the existence of strong evidence supporting the allegations and demonstrating that defendant was not credible, we find that any improper impeachment was not outcome determinative, and defendant suffered no prejudice. *Id.*

“A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial.” *People v Ortiz-Kehoe*, 237 Mich App 508, 514; 603 NW2d 802 (1999). Because defendant has failed to demonstrate that the improper impeachment was prejudicial or denied him a fair trial, a mistrial was not warranted. Thus, the trial court did not abuse its discretion when it denied defendant’s motion for mistrial.

Defendant next argues that the trial court improperly instructed the jury with regard to unanimity and allowed the jury to convict defendant of CSC based on anal penetration, without agreeing on the specific anal act that supported the conviction. Because defendant specifically expressed satisfaction with the jury instructions, we find that this issue has been waived. *People v Carter*, 462 Mich 206, 214-219; 612 NW2d 144 (2000). Because defendant waived this issue, there is no “error” to review. *Id.* at 219. Under the circumstances of this case, we also note that the general unanimity instruction given by the trial court was sufficient and a more specific instruction was not warranted. *People v Cooks*, 446 Mich 503, 530; 521 NW2d 275 (1994). Moreover, our review of the record shows that there was only one act of anal penetration which could have led to the CSC conviction on that count. Thus, based on the record, there could not have been confusion about which act supported the conviction. Finally, we note that, contrary to defendant’s misrepresentation, the trial court did not improperly instruct the jury that it did not have to be unanimous with regard to the anal penetration.

Lastly, defendant argues that his sentence is disproportionate and that he is entitled to resentencing before a different judge. The issue of proportionality is not preserved because defendant failed to file his presentence investigation report (PSIR) with this Court. See *People v Rodriguez*, 212 Mich App 351, 355; 538 NW2d 42 (1995). Because we do not have the PSIR, we cannot properly review the sentences to determine if they are proportionate to the circumstances surrounding the background of the offender. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990).

Finally, although the trial judge was not congenial to defendant at sentencing and curtly denied most of his challenges at the sentencing hearing, there was no evidence that the trial court was unable to fairly sentence defendant or that he sentenced defendant arbitrarily and without regard to the circumstances surrounding the offense or the offender. In fact, a review of the sentencing transcript reveals that the trial court sentenced defendant based on the seriousness of the crime and with full knowledge of the facts.

Affirmed.

/s/ Michael R. Smolenski  
/s/ Donald E. Holbrook, Jr.  
/s/ Hilda R. Gage