

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL ZAVETA,

Defendant-Appellant.

UNPUBLISHED

January 26, 2001

No. 218600

Wayne Circuit Court

Criminal Division

LC No. 98-003024

Before: Saad, P.J., and White, and Hoeksta, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree criminal sexual conduct (“CSC”), MCL 750.520c(1)(b); MSA 28.788(3)(1)(2), and sentenced to five years’ probation. He appeals as of right, and we affirm.

I

Defendant claims that reversal of his conviction is required because the trial court failed to dismiss one of two alternate jurors in accordance with the “blind draw” method, as required by MCR 6.411. We disagree.

The trial court’s decision to remove a juror will only be reversed when there has been a clear abuse of discretion. *People v Van Camp*, 356 Mich 593, 604-605; 97 NW2d 726 (1959); *People v Mason*, 96 Mich App 47, 49-50; 292 NW2d 480 (1980). An abuse of discretion occurs when the result was so violative of fact and logic that it evidenced a perversity of will, a defiance of judgment, or an exercise of passion or bias. *People v Torres (On Remand)*, 222 Mich App 411, 415; 564 NW2d 149 (1997).

MCR 6.411 provides for the impaneling of more than twelve jurors, and for the elimination of extra jurors by lot before deliberations. It does not provide the only authority under which a court may excuse a juror after the jury has been impaneled. MCL 768.18; MSA 28.1041 provides:

Any judge of a court of record in this state about to try a felony case which is likely to be protracted, may order a jury impaneled of not to exceed 14 members, who shall have the same qualifications and shall be impaneled in the

same manner as is, or may be, provided by law for impaneling juries in such courts. All of those jurors shall sit and hear the cause. *Should any condition arise during the trial of the cause which in the opinion of the trial court justifies the excusal of any of the jurors so impaneled from further service, he may do so and the trial shall proceed, unless the number of jurors be reduced to less than 12.* [Emphasis added.]

This statute does not give the trial court arbitrary power to excuse extra jurors according to the court's own inclinations. *Van Camp, supra* at 604-605. There must be factual justification under the statute similar in character to that which would authorize excusal of a member of a jury panel. *Id.* at 605. Defendant argues that the dismissal of the juror at issue constituted reversible error because the record does not establish adequate cause for dismissal, and prejudice must be presumed.

Here, immediately after the jury was impaneled, the juror at issue, who was an anesthesiologist, informed the court that she had been awake for the past 24 hours as a result of being on-call. The court did not excuse the juror at that time, but stated that it would probably excuse her when the trial was over. After instructing the jury, and before deliberations, the court, over defendant's objection, excused the juror as one of the alternates, and chose the second alternate by lot. The court established on the record that the juror had been involved in a surgery most of the night before the first day of trial, and had been yawning during the trial, although she had not been on call the second night. Under the circumstances, we find that the trial court's decision to excuse the juror was based on the court's perception of the juror's sleep deprivation and a conclusion that the juror's condition likely impeded her from remaining attentive throughout the trial. While the court should have tested that perception by allowing questioning of the juror, we find that the court's action was based on a reasonable concern regarding the juror's ability to discharge her duty and was not an abuse of discretion. Even assuming an abuse of discretion, we reject defendant's argument that the excusal of a juror under the circumstances involved here constitutes a violation of the right to a jury trial comparable to those found in *People v Miller*, 411 Mich 321; 307 NW2d 335 (1981); *People v Schmitz*, 231 Mich App 521; 586 NW2d 766 (1998); and *People v Colon*, 233 Mich App 295; 591 NW2d 692 (1998), where the defendants were not required to show prejudice. Those cases involved the use of an impermissible method of selecting the jury (*Miller* and *Colon*) and the court's erroneous denial of the right to exercise peremptory challenges (*Schmitz*). The situation is more akin to excusal of a single juror where there has not been a showing sufficient to support a challenge for cause. In such cases, a showing of prejudice is required. *People v Weatherspoon*, 171 Mich App 549,560; 431 NW2d 75 (1988); *People v Clyburn*, 55 Mich App 454, 457; 222 NW2d 775 (1974).

II

Defendant also argues that the trial court infringed on his right to present a defense when it limited his expert psychologist's testimony regarding "syndrome evidence." We disagree.

This Court reviews a trial court's decision to admit evidence, including expert testimony, for an abuse of discretion. *People v Watkins*, 176 Mich App 428, 430; 440 NW2d 36 (1989). We have reviewed the direct examination of defendant's expert in its entirety and conclude that defense counsel's questions sought to procure an expert opinion that defendant did not commit

criminal sexual conduct. It is well established that an expert may not be used as a type of “human lie detector” and may not render an opinion on or assess a witness’ veracity in a criminal sexual conduct case. *People v Smith*, 425 Mich 98, 112-113; 387 NW2d 814 (1986); *People v Izzo*, 90 Mich App 727, 730; 282 NW2d 10 (1979). Rather, it is the province of the jury to assess the credibility of witnesses. See *People v Johnson*, 397 Mich 686, 687; 246 NW2d 836 (1976); *People v Barclay*, 208 Mich App 670, 676; 528 NW2d 842 (1995)

Further, defendant was not denied his right to present a defense through the testimony of his expert witness. Defendant’s expert was permitted to testify concerning defendant’s psychological makeup to assist the jury in assessing defendant’s credibility along with the other evidence presented. Defendant’s expert testified in great detail regarding his studies and database, and the characteristics, syndromes and symptoms of a “predator and rapist or someone involved in CSC.” Defendant’s expert explained that a hypothetical person with defendant’s characteristics and traits had an “extremely low probability” of sexually molesting a child. Defendant’s expert also stated that defendant did not fit the profile of a child abuser. In addition, defendant’s expert testified extensively regarding the protocol for investigating a CSC case, and the lack of pertinent information in the instant case.

Finally, defendant’s reliance on cases in which courts have allowed battered woman and child abuse syndrome evidence is misplaced. Here, there was no claim made by either party that defendant suffered from “child abuser syndrome.” Nevertheless, consistent with the established parameters for admissibility of “syndrome evidence,” defendant’s expert was allowed to describe the “child abuser syndrome,” and testify that it was unlikely that a person with defendant’s characteristics would molest a child. See *People v Christel*, 449 Mich 578, 580; 537 NW2d 194 (1995); *People v Beckley*, 434 Mich 691, 725-727, 729; 456 NW2d 391 (1990). We therefore conclude that the trial court did not abuse its discretion when it precluded defendant’s expert from rendering an opinion regarding whether defendant committed the sexual assault under the guise of presenting “syndrome evidence,” because such testimony would have invaded the province of the jury.

Affirmed.

/s/ Henry William Saad

/s/ Helene N. White

/s/ Joel P. Hoekstra