

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL YOUNG,

Defendant-Appellant.

UNPUBLISHED

December 28, 2006

No. 263206

Kent Circuit Court

LC No. 04-002462-FC

Before: O’Connell, P.J., and White and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count each of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(G), third-degree criminal sexual conduct, MCL 750.520d(1)(C), and second-degree criminal sexual conduct, MCL 750.520c(1)(G). The trial court sentenced defendant to concurrent terms of 51 to 205 months’ imprisonment for his first-degree CSC conviction, 36 to 180 months’ imprisonment for his third-degree CSC conviction, and 29 to 180 months’ imprisonment for his second-degree CSC conviction. Defendant appeals as of right. We affirm in part and vacate in part.

Defendant's convictions were based on the sexual assault of a 21-year-old victim in the early morning hours of January 9, 2005. Defendant was convicted for having sexual intercourse, performing cunnilingus, and sexually touching the victim while she was physically helpless to communicate her unwillingness to engage in these acts. The victim testified that she went to a bar to “get drunk” and dance. While at the bar she met defendant, accepted shots of alcohol from him, and kissed him. Defendant subsequently drove the victim and her friend to the friend’s apartment. Defendant was invited into the apartment. At the apartment, the victim passed out and later awoke to defendant performing cunnilingus on her. Defendant then had sexual intercourse with the victim despite her protestations. Defendant admitted to engaging in the sexual activity, but claimed it was consensual.

Defendant first argues that the trial court incorrectly denied his motion for a directed verdict on two of the counts. He asserts that the victim was not “physically helpless” at the time those acts occurred. We agree in part. “When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt.” *People v Aldrich*, 246 Mich App 101, 122-123; 631 NW2d 67 (2001).

To prove the charges at issue, the second-degree CSC and third-degree CSC, the prosecutor had to prove, among other elements, that the victim was physically helpless at the time of the alleged act. MCL 750.520b(1)(g); MCL 750.520c(1)(g). Under Michigan law “physically helpless means that a person is unconscious, asleep, or for any other reason is physically unable to communicate unwillingness to act.” MCL 750.520a(k). By her own testimony, the victim was not unconscious, asleep or physically unable to communicate an unwillingness to act. This is clear from the fact that she actually communicated an unwillingness to agree to the sexual penetration charged in Count Two. She repeatedly told defendant “no.” Count Two charged defendant with sexual penetration with the victim, and Count Three charged sexual contact with the victim’s breasts. While all of the other elements were met, there was no evidence at all that the victim was “physically helpless” at the time of the sexual penetration charged in Count Two. Thus, we vacate defendant’s second-degree CSC conviction. Defendant was entitled to a directed verdict on that count.

With respect to Count Three, however, the trial court properly denied a directed verdict. Viewing the evidence in the light most favorable to the prosecutor, a rational trier of fact could have found that the victim was physically helpless at the time defendant touched her breasts as charged in Count Three. The victim told a medical care provider that she awoke to her breasts being fondled. If the jury believed the victim’s claim, she was physically helpless at the time of that sexual contact. We affirm the trial court’s denial of a directed verdict as to Count Three.

Defendant’s next argument on appeal is that the trial court abused its discretion by denying defendant’s motion for a new trial. Defendant claims that the verdict was against the great weight of the evidence. We review the denial of a motion for a new trial for an abuse of discretion. *People v Stiller*, 242 Mich App 38, 53; 617 NW2d 697 (2000). This Court generally defers to the trial court’s determination that a verdict is not against the great weight of the evidence because the trial court had the opportunity to hear the witnesses and assess credibility. *In re Leone Estate*, 168 Mich App 321, 324; 423 NW2d 652 (1988). A new trial should be granted only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998).

Defendant argues that the verdict was against the great weight of the evidence because the only evidence to support the charges came from the victim. Defendant argues that the victim’s testimony cannot be believed because she was inconsistent in her statements. We disagree. While the victim offered testimony that was, to some extent, inconsistent with her prior statements, the question of her credibility was for the finder of fact to resolve. *People v Sharbnow*, 174 Mich App 94, 105; 435 NW2d 772 (1989). The two inconsistencies argued by defendant are that 1) the victim explained at trial and to police that she awoke to defendant performing oral sex on her, but she told medical personnel that she awoke to defendant touching her breasts, and 2) that the victim claimed that she only kissed defendant while at the bar, but her friend testified to seeing them kiss after leaving the bar as well. “Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial.” *Lemmon, supra* at 647. While there are some minor inconsistencies in the victim’s testimony, they do not necessarily cast such a doubt as to believe that there was a miscarriage of justice. *Id.* The first statement is not necessarily contradictory, as defendant could have been performing cunnilingus and touching the victim’s breasts simultaneously. And, the second statement is not critical to the

case and could be due to memory lapse due to intoxication or the passage of time. Accordingly, we find that the verdict was not against the great weight of the evidence.

Defendant next argues that the trial court abused its discretion by denying defendant's motion for an adjournment to allow for his attorneys to prepare for trial. We agree that the court should have granted the adjournment, but find that defendant has failed to establish prejudice to support reversal. Review of the grant or denial of an adjournment is for an abuse of discretion. *People v Peña*, 224 Mich App 650, 660; 569 NW2d 871 (1997), mod and remanded in part on other grounds 457 Mich 885; 586 NW2d 925 (1998). A motion for a continuance must be based on good cause. *People v Jackson*, 467 Mich 272, 276; 650 NW2d 665 (2002), citing MCR 2.503(B)(1). Relevant factors in determining whether good cause is established include: (1) whether the defendant was asserting a constitutional right, (2) whether the defendant had a legitimate reason for asserting the right, (3) whether defendant was guilty of negligence, and (4) whether defendant had previously caused the trial to be adjourned. *People v Coy*, 258 Mich App 1, 18; 669 NW2d 831 (2003). If a defendant establishes that the trial court abused its discretion, he must still establish that he was prejudiced by the decision. *Id.* at 661.

Defendant informed the trial court that he wanted to make a substitution of counsel on March 1, 2005, which was the day before his trial was scheduled. The motion was denied. The very next day, due to bad weather, the jury pool was not adequate to enable the trial to proceed, so the court adjourned trial until March 7, 2005. Additionally, the trial court stated that it would allow defendant to change counsel, but it warned

[t]he other requirement is that the case is adjourned until Monday, and we begin a whole new process. We will have a trial Monday. We have the complainant and the defendant and the defense attorney. If you wish to change defense attorneys – and I don't comment on the wisdom of that decision – that attorney, whoever he or she may be, should clearly understand that the trial is going to go on Monday. There will be no adjournment because of that change in personnel. For this reason, I told Mr. Bland, as he is attorney of record, he will remain counsel of record until I receive that substitute appearance from counsel who is ready to try the case on Monday.

Defendant chose to switch counsel. On March 7, 2005, the day trial was set to begin, defendant's new counsel requested an adjournment, stating that the case was not ready for trial because an expert had not been retained to refute the prosecution's expert testimony, and because counsel had not been provided with a full transcript of the first trial. The trial court denied the motion.

Defendant was asserting his constitutional right to counsel. He had a legitimate concern whether his retained counsel would provide adequate representation on retrial. He had not been tardy or negligent in asserting this right, and he had not requested an adjournment previously.

Former counsel explained to the court that he had offered defendant advice that defendant had rejected, that defendant later called counsel indicating that he was losing confidence in him, that counsel did not feel that defendant was engaging in a manipulation to secure more time, and that counsel was, in fact, finding it difficult to "get up" for the retrial. Upon invitation of the court, defendant continued:

I think it started when he wanted me to agree to CSC four, and I told him that I didn't do anything wrong, so it's very difficult for me to agree to that. I felt like he was getting upset and agitated with me.

As conversations progressed throughout the morning yesterday, he did mention already that he was having a hard time getting up for the trial. He said he never tried a case twice before, and he said these cases were difficult emotionally on him. He said quite honestly he has better things to do with his time and, you know, he was convinced that I haven't done anything wrong but, because he didn't want to go to trial, he wanted me to take a CSC four and, combined with those factors, I have a hard time having him represent me.

The court rejected the request to adjourn and the case continued with voir dire. Later, when there were insufficient jurors to continue the selection, the court permitted an adjournment and substitution of counsel conditioned upon defendant paying the costs of the adjournment, and the understanding that trial would continue on the following Monday, regardless of whether new counsel sought an adjournment.

While the court made it clear that the trial would proceed on the scheduled day, and defendant knew this when he chose to switch counsel, it was nevertheless improper to condition the adjournment upon acceptance of these terms. If the balance weighed in favor of allowing the adjournment, the denial of the adjournment was not excused by defendant's acceptance of the conditions.

Nevertheless, defendant is required to show prejudice in order to obtain a reversal and new trial. Here, defendant argues that counsel was unable to obtain an expert to rebut the prosecution's expert's testimony.¹ However, the prosecution expert simply testified to the presence of tears in the vaginal area. There was no testimony that this was evidence of non-consensual sexual activity. In fact, the expert admitted that the physical evidence could have resulted from consensual intercourse engaged in by the victim four days prior to the exam. Defendant is required to show prejudice from the denial of the adjournment. Because he has not done so, his claim of error based on the refusal to grant the adjournment must fail.

Finally, defendant argues on appeal that the trial court committed plain error by incorrectly recording defendant's convictions on the judgment of sentence. Defendant claims that the word "incapacitated," which appears on the judgment, implies that defendant was found guilty of criminal sexual conduct with a "*mentally* incapacitated" victim, when in fact his convictions were for sexual conduct with a "physically helpless" victim. However, "incapacitated" is defined as the "lack of physical or mental capabilities." Black's Law Dictionary (8th ed). "Physically helpless" means that a person is unconscious, asleep, or for any other reason is physically unable to communicate unwillingness to act." MCL 750.520a(k). Therefore, the term "incapacitated" as used in the judgment accounts for victims who are both physically helpless and mentally incapacitated. It is a general, encompassing term, and it was

¹ The transcripts of the first trial were provided during the trial.

appropriate for this judgment of sentence. Therefore, the judgment of sentence does not improperly portray the theory under which defendant was convicted. Defendant's judgment of sentence does not need to be revised.

We affirm defendant's convictions and sentences for both first-degree and third-degree CSC, but we vacate defendant's conviction and sentence for second-degree CSC.

/s/ Peter D. O'Connell

/s/ Helene N. White

/s/ Jane E. Markey