STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARCUS MARTINEZ BENSON,

Defendant-Appellant.

UNPUBLISHED
October 20, 1998

No. 194632
Macomb Circuit Court
LC No. 95-002022 FC

Before: Fitzgerald, P.J., and Holbrook, Jr., and Cavanagh, JJ.

PER CURIAM.

A jury convicted defendant of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a) (person under 13 years of age), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a) (person under 13 years of age). The trial court sentenced defendant to twenty to forty years' imprisonment for the first-degree CSC conviction, and a concurrent term of ten to fifteen years' imprisonment for the second-degree CSC conviction. Defendant appeals as of right. We affirm, but remand this matter to the trial court so that defendant, an indigent, may receive a copy of his voir dire transcript.

At trial, the eleven-year-old complainant testified that on July 14, 1995, she and her mother went to stay overnight at a motel with defendant and his minor daughter. As of this time, defendant and complainant's mother had been romantically involved for approximately six months. Complainant further testified that in the early morning hours of July 15, as complainant's mother and defendant's daughter were asleep, defendant placed his hand over the complainant's mouth, dragged her into the bathroom and closed the door, removed her clothing, and used his penis to anally and vaginally penetrate her. The assault ended when complainant's mother kicked her way into the bathroom. Defendant denied the assault, explaining that he had gotten up to use the bathroom and take a shower. Defendant claimed that, unbeknownst to him, the complainant entered the bathroom after he removed his clothing and closed the door behind her. According to defendant, complainant's mother then entered the bathroom and incorrectly assumed that he had sexually assaulted her daughter.

I

Defendant first argues that the trial court abused its discretion by allowing the prosecutor to amend her witness list to add Nicole Roth[1] as a witness on the first day of trial. Defendant argues that he is entitled to reversal of his convictions because the trial court failed to determine whether good cause existed to justify late amendment of the prosecutor's witness list. Defendant alleges that his inability to research the subject of Roth's testimony (i.e., the complainant's asserted post-traumatic stress disorder), unfairly prejudiced his ability to fully cross-examine Roth, thereby denying him a fair trial. We disagree.

Under MCL 767.40a(4); MSA 28.980(1)(4), a prosecutor may make a "late endorsement of a witness at any time upon leave of the court and for good cause shown." *People v Lino (On Remand)*, 213 Mich App 89, 92; 539 NW2d 545 (1995), overruled on other grounds *People v Carson*, 220 Mich App 662; 560 NW2d 657 (1996). "The trial court's decision to allow late endorsement of a witness is reviewed for an abuse of discretion." *Lindo, supra* at 92. "An abuse of discretion can be found where the defendant is able to show prejudice as a result of . . . amendment of the witness list." *People v Rode*, 196 Mich App 58, 68; 492 NW2d 483 (1992), rev'd on other grounds sub nom *People v Hana*, 447 Mich 325; 524 NW2d 682 (1994).

The record shows that the trial court did not determine whether their was good cause for the late endorsement. This procedural error, however, does require an automatic reversal. As the *Lindo* Court correctly observed, "[a] violation of § 40a is not necessarily fatal. Rather, the trial court must exercise its discretion in fashioning a remedy for non-compliance." *Lindo, supra* at 92.[2] Here, the trial court's remedy was two-fold. First, Roth's testimony was limited to whether and for how long she had administered psychiatric care to the complainant, and for what psychiatric disorder the complainant was treated. Second, the prosecutor was to allow defendant a chance to interview Roth before she was to testify in order to prepare for cross-examination. Defendant, however, did not avail himself of this opportunity. Under the circumstances of this case, we conclude that the trial court fashioned an acceptable remedy for the prosecutor's non-compliance with MCL 767.40a(4); MSA 28.980(1)(4). Given defendant's failure to establish that he suffered any prejudice as a result of the late endorsement, we find no abuse of discretion. *Burwick, supra* at 298; *Lindo, supra* at 93.

II

Next, defendant argues that the trial court erred in denying his motion to conduct an in camera review of records pertaining to the complainant's psychological counseling and treatment. We disagree. We review the trial court's decision to deny in camera inspection of records containing privileged communications for an abuse of discretion. *People v Stanaway*, 446 Mich 643, 680; 521 NW2d 557 (1994).

Records of confidential communications made to sexual assault counselors, social workers, and treating psychiatrists and psychologists are generally privileged. MCL 600.2157a(2); MSA 27A.2157(1)(2) (sexual assault counselors), MCL 339.1610(1); MSA 18.425(1610)(1) (social workers), MCL 330.1750(2); MSA 14.800(750)(2) (psychiatrists and psychologists); *Stanaway*,

supra at 658-661. However, in "an appropriate case," where the defendant establishes "a good-faith belief, grounded on some demonstrable fact, that there is a reasonable probability that the otherwise privileged records are likely to contain material information necessary to the defense," the trial court has the option of conducting an in camera inspection of the records to determine whether they contain evidence necessary to the defense. *Stanaway, supra* at 677.

We conclude that the trial court did not abuse its discretion by denying defendant's discovery request. Defendant failed to establish, with reference to demonstrable fact, a reasonable probability that the complainant's counseling records contained evidence necessary to his defense. Defendant merely alleged that the complainant's records *might* contain inconsistent statements because her account of the assault had changed between the time the complainant made her statement to the police and the preliminary examination. This does not satisfy the criteria for overcoming the privilege. The possibility that such conversations might contain evidence useful for impeachment purposes arguably exists in every criminal sexual conduct case. *Id.* at 681. Without more, it appears to us that defendant was "on 'an improper fishing expedition to see what may turn up.'" *Id.* at 680, quoting *Bowman Dairy Co v United States*, 341 US 214, 221; 71 S Ct 675; 95 L Ed 2d 879 (1951). Accordingly, the trial court was justified in denying defendant's request for in camera inspection of the complainant's counseling records. *Id.* at 680-682.[3]

III

Next, defendant argues that he is entitled to reversal of his convictions because repeated instances of prosecutorial misconduct denied him a fair and impartial trial. We disagree. The test for prosecutorial misconduct "is whether the defendant was denied a fair and impartial trial." *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). This Court decides issues of prosecutorial misconduct on a case-by-case basis, examining the pertinent portion of the record and evaluating a prosecutor's comments in context. *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994).

A

First, defendant argues that he is entitled to reversal because the prosecutor engaged in misconduct when she attempted to bolster the credibility of defendant's daughter, called to testify by the prosecution, by trying to elicit a prior consistent statement from the witness. We disagree. Initially, we reject defendant's categorization of the questioning of defendant's daughter as an attempt to bolster the girl's credibility. In our opinion, the questioning was either an attempt to lead the witness to the extent necessary to develop her testimony, MRE 611(C)(1); *People v Kosters*, 175 Mich App 748, 756; 438 NW2d 651 (1989), or attempt to impeach her with a prior inconsistent statement, MRE 607, 613. Furthermore, whatever the propriety of the prosecutor's attempted questioning, the testimony at issue was entirely favorable to defendant. Thus, we find no merit in this argument.

B

Next, defendant argues that the prosecutor improperly sought to convict defendant by placing the prestige of her own office and that of the police behind the State's case and the complainant's credibility as a witness by questioning a police officer during re-direct examination about his investigatory practices. We do not agree that this line of questioning denied defendant a fair trial. A careful reading of the officer's testimony shows that defense counsel himself opened the door to these lines of questioning on cross-examination.

During cross-examination, defense counsel raised the impression that the police had wrongly withheld favorable evidence from defendant and were concerned only with obtaining a conviction in this case. Defense counsel also asked the officer about whether he had any experience with children who lied to the police and felt pressured by the weight of the circumstances to continue lying. Under these circumstances, we find that it was permissible for the prosecutor to attempt to show that the officer understood his duties and obligations as a police officer, as well as his experience interviewing children involved in sexual assault cases. "'On redirect examination a witness should be permitted to explain an answer made on cross-examination.'" *People v Babcock*, 301 Mich 518, 529; 3 NW2d 865 (1942), quoting 1 Gillespie, Michigan Criminal Law and Procedure, p. 388. Accord *People v Harris*, 127 Mich App 538, 545; 339 NW2d 45 (1983).

C

Next, defendant contends that he was denied a fair trial when the prosecutor asked defendant and two defense witnesses whether defendant had a drug problem. With regard to the question posed to defendant, we note that the trial court sustained defendant's objection and then immediately informed the jury to disregard it. Given these circumstances, we do not believe the posing of this question to defendant denied him a fair trial. As for the questions posed to the two defense witnesses, defendant acknowledges in his brief on appeal that the two witness were character witnesses. Once defendant placed his character in issue, it was "proper for the prosecution to introduce evidence that the defendant's character is not as impeccable as is claimed." *People v Vasher*, 449 Mich 494, 503; 537 NW2d 168 (1995). Accord *People v Leonard*, 224 Mich App 569, 594; 569 NW2d 663 (1997).

D

Next, defendant argues that he was denied a fair trial when the prosecutor asked defendant's daughter whether she was living with him at the time of trial. The girl replied that she was living with one of defendant's character witnesses. Defendant argues that he was prejudiced by this answer because it could be used by the jury to infer that he was incarcerated at the time of trial. See *People v Shaw*, 381 Mich 467, 474; 164 NW2d 7 (1969) (observing that in order to preserve a defendant's presumption of innocence, the defendant has the right not to appear before a jury garbed in prison clothing).

We find no merit in this argument. First, there is no evidence in the record that the jury made the inferential leap argued by defendant, or that defendant was prejudiced even if such an inference was made. Second, we note that defense counsel specifically rejected the idea that a curative instruction be given. Assuming that defendant could have been prejudiced by this question and answer, we believe that such prejudice could have been obviated by a cautionary instruction. Third, we note that the jury

was instructed that defendant's innocence is presumed, and that its verdict should be based solely on the evidence adduced at trial. Under these circumstances, we do not believe that this singular question and answer denied defendant a fair and impartial trial.

E

Next, defendant claims he was denied a fair trial because the prosecutor intentionally misstated the law in order to confuse the jury as to what effect one piece of evidence could have on its ultimate finding of guilt or innocence. We disagree. The prosecutor was responding, as is permitted, to defendant's statement to the jury that the prosecutor had urged the jury to convict defendant on the basis of complainant's mother's testimony alone. *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989). Furthermore, we note that during the course of the debate between counsel on the issue, the court instructed the jury that counsels' argument is not evidence. This directive was repeated in the final jury instructions, along with the instruction that it is the court alone that the jury "must take the law as I give it to you. If a lawyer says something different about the law, follow what I say."

In sum, these closing comments and the other alleged instances of prosecutorial misconduct did not deny defendant a fair and impartial trial.

IV

Next, defendant argues that he was denied a fair trial because three jurors saw him being led to the courtroom in handcuffs. We disagree. Freedom from shackling during trial is a long-recognized component of a fair and impartial trial. *People v Dunn*, 446 Mich 409, 425-426; 521 NW2d 255 (1994). "However, this rule does not extend to circumstances in which a defendant may be shackled outside a courtroom to prevent escape. In addition, where a jury inadvertently sees a shackled defendant, there must be some showing that prejudice resulted." *People v Moore*, 164 Mich App 378, 384-385; 417 NW2d 508 (1987), modified on other grounds 433 Mich 851; 442 NW2d 638 (1989) (citations omitted). Defendant has failed to show that prejudice resulted from three jurors having seen him in handcuffs being transported to the courtroom. Defendant's exposure was inadvertent and limited. Only three jurors saw defendant in handcuffs, and the record establishes that they did not tell the other jurors what they had seen. Additionally, none of the jurors indicated that seeing defendant in handcuffs adversely affected their ability to render a fair verdict. Therefore, we find no error requiring reversal. *Id.*

V

Next, defendant argues that he was denied a fair trial because the trial court refused to read CJI2d 5.8a, regarding defendant's good character for sexual morality, to the jury. "This Court reviews jury instructions in their entirety to determine if there is error requiring reversal. The instructions . . . must not exclude material issues, defenses, and theories, if there is evidence to support them." *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). We conclude that because defendant failed to present character evidence regarding his good sexual morals, the trial court did not error when

refusing to give CJI2d 5.8a. The instructions given fairly presented the issues to be tried and sufficiently protected defendant's rights. *Id.*

VI

Next, defendant contends that he was denied a fair trial because a police officer testified that defendant exercised his *Miranda*[4] rights during custodial interrogation. We do not find the officer's testimony to be grounds for reversal. Although defendant originally motioned the trial court for a mistrial in response to the testimony, defendant eventually dropped that request. Alternatively, defendant presented the trial court with a curative instruction defense counsel had written. The instruction clearly and correctly stated that defendant was well within his rights when he invoked his privileges at police interrogation, and explicitly ordered the jury to "completely disregard" the officer's testimony, and not "to consider that testimony in any manner." Absent clear indication to the contrary, the jury is presumed to have followed this instruction. *People v Wolverton*, 227 Mich App 72, 77; 574 NW2d 703 (1997).

VII

Next, defendant argues that the version of MCR 6.425[5] effective as of his commencement of this appeal unconstitutionally denied him effective assistance of appellate counsel insofar as it requires a showing of just cause before he may obtain a copy of his voir dire transcript. We agree.

In *People v Bass (On Rehearing)*, 223 Mich App 241, 258-260; 565 NW2d 897 (1997), this Court addressed the question whether the conditions imposed on receipt of the voir dire transcript as provided by MCR 6.425(F)(2)(a)(i) violated an indigent defendant's right to counsel on appeal, where the appointed appellate counsel was not the defendant's trial counsel. The *Bass* Court observed:

> In order to faithfully discharge the duties imposed by the Appellate Defender Commission and the Supreme Court, counsel must have access to transcripts of *all the proceedings* so that all issues of legal merit can be raised. Although appellate counsel could contact trial counsel and inquire about voir dire, information obtained from trial counsel is not a substitute for a transcript because trial counsel's memory may be faulty, trial counsel may not be aware that an error occurred during voir dire . . . , or trial counsel may be the target of the defendant's claim of error. *We therefore conclude that a transcript of voir dire must be provided in all cases where appointed appellate counsel was not the indigent defendant's trial counsel.* [*Id.* at 260 (emphasis added).]

After initially staying the precedential effect of *Bass*, *People v Bass*, 456 Mich 851; 564 NW2d 902 (1997), the Supreme Court ultimately vacated that stay with respect to the issue of the availability of voir dire transcripts in circumstances such as those in the case at hand. *People v Bass*, 457 Mich 865, 866; ___ NW2d ___ (1998). Further, the Supreme Court took it upon itself to amend without notice MCR 6.425(F)(2)(a)(i), specifically deleting the rule's exclusion of the jury voir dire transcript

from those transcripts that must be provided unless certain circumstances were applicable.[6] This action clearly signals the Supreme Court's considered judgment that jury voir dire transcripts must be provided in circumstances such as those present here. Accordingly, we remand this matter so that defendant may receive a copy of the voir dire transcript.

VIII

Finally, we reject defendant's contention that the cumulative effect of errors committed at trial denied him a fair trial. See *People v Cadle*, 204 Mich App 646, 658; 516 NW2d 520 (1994).

We remand this matter so that defendant may obtain a copy of the voir dire transcript. Affirmed in all other aspects. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Mark J. Cavanagh

[1] The trial court also granted the prosecutor's request to add two other witnesses to her witness list. However, because the prosecutor never called these witnesses to testify, we confine our analysis of this issue only to whether the trial court's decision to allow Roth to testify constituted an abuse of discretion.

[2] This is in keeping with one of the principal purposes underlying modern liberal discovery practices. As the Michigan Supreme Court observed in *People v Burwick*, 450 Mich 281, 298; 537 NW2d 813 (1995): "A primary purpose of discovery is to enhance the reliability of the fact-finding process . . . Assuming a statutory violation, the court must weigh this paramount interest against the opposing parties' interests in an adequate opportunity to meet the proofs."

[3] Moreover, we note that regardless of his inability to inspect the counseling records, defendant thoroughly attacked the complainant's credibility by examining her and other witnesses about inconsistencies between her statements to the police and those she made at the preliminary examination.

[4] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[5] MCR 6.425(F) read in pertinent part:

> (2) *Order to Prepare Transcript.* The appointment order also must
>
> > (a) direct the court reporter to prepare and file, within the time limits specified in MCR 7.210,
> >
> > (i) the trial or plea proceeding transcript, excluding the transcript of the jury voir dire unless the defendant challenged the jury array, exhausted all preemptory challenges, was sentenced to serve a term of life imprisonment without the possibility of parole, or shows good cause.

[6] MCR 6.425(F) now reads in pertinent part:

> (2) *Order to Prepare Transcript.* The appointment order also must
>
> > (a) direct the court reporter to prepare and file within the time limits specified in MCR 7.210,
> >
> > > (i) the trial or plea proceeding transcript.