

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

REGINALD JOHNSON,

Defendant-Appellant.

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UNPUBLISHED

July 20, 2004

No. 246930

Wayne Circuit Court

LC No. 02-004412-01

Before: Zahra, P.J., and Talbot and Wilder, JJ.

PER CURIAM.

A jury convicted defendant of second-degree criminal sexual conduct, MCL 750.520c(k) (where the victim is a prisoner under jurisdiction of the county and the actor is an employee with the county or department of corrections who knows that the victim is under the county's jurisdiction). Defendant was sentenced to ten months to fifteen years' imprisonment. He appeals as of right. We affirm.

I. Basic Facts

Evidence was presented at trial that defendant, a Wayne County corrections officer, while on duty removed inmate Tara Hamed from a jail cell and directed her into an unoccupied office. In the office, defendant walked Hamed around a desk and began to kiss her and place his hands on her body. Hamed told defendant "no," and tried to get him off her. Defendant pushed Hamed up against a desk, digitally penetrated her, and attempted to have intercourse with her. He did not succeed because Hamed was struggling too much. But defendant did force Hamed to her knees and ejaculated on her. He then walked out of the room and returned with toilet paper. He gave Hamed some toilet paper and told her to go back to a jail cell.

Hamed was released from jail four days after the assault. She then returned the following morning to file a complaint. There she spoke with Detective Linda Wells of the Wayne County Sheriff's Department Internal Affairs Division, who testified at trial that Hamed knew many details about the room she was assaulted in that could not have been known if she had not been inside the room. Hamed also gave Wells the clothes that she had been wearing at the time of the assault. DNA evidence established that defendant's seminal fluid was on Hamed's shirt. Defendant's theory at trial was that Hamed consented to the sexual situation and even encouraged it to gain a monetary judgment from Wayne County.

## II. Evidentiary Issues

Defendant argues that the trial court violated his constitutional right to confrontation by not allowing several lines of questioning that implicated Hamed's credibility. We disagree.

### A. Standard of Review

A preserved evidentiary issue is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). However, because defendant's argument implicates his Sixth Amendment right to confront his accuser, we review the issue de novo. See *People v Smith*, 243 Mich App 657, 681-682; 625 NW2d 46 (2000).

### B. Analysis

A defendant has a constitutional right to confront his accusers under the Sixth Amendment of the United States Constitution, and Const 1963, art 1, § 20. *People v Bean*, 457 Mich 677, 682; 580 NW2d 390 (1998). However, "neither the Sixth Amendment Confrontation Clause, nor due process, confers on a defendant an unlimited right to cross-examine on any subject." *People v Cantor*, 197 Mich App 550, 564; 496 NW2d 336 (1992). The court may deny cross-examination with respect to collateral matters bearing only on general credibility, as well as on irrelevant issues. *Id.* The court has the discretion to limit the scope of cross-examination. *Id.*

Further, MRE 402 provides that evidence that is not relevant is inadmissible. *People v Starr*, 457 Mich 490, 497; 577 NW2d 673 (1998). MRE 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

The credibility of witnesses is considered a material issue and evidence that shows bias or prejudice of a witness is always relevant. *People v Mills*, 450 Mich 61, 72; 537 NW2d 909, mod 450 Mich 1212 (1995). Even if evidence is relevant, it may be excluded if its probative value is substantially outweighed by such things as the danger of unfair prejudice, confusion of the issues, misleading the jury, or needless presentation of cumulative evidence. MRE 403; *People v Houston*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 245889, issued 4/1/04), slip op, p 2.

#### i. Hamed's Prior Conduct.

Defendant first argues that the trial court erred in finding irrelevant evidence that Hamed had previously exposed her breasts to corrections officers to get cigarettes and contraband.

Defense counsel was permitted to question Hamed regarding whether she "flashed [her] breast to [defendant]" and whether defendant when booking Hamed had to take four pictures of her because she was exposing her breasts during some of the photographs. However, when defense counsel asked if Hamed had exposed her breasts in the past to gain contraband or cigarettes, the court disallowed the question as irrelevant.

We conclude that whether Hamed exposed her breasts in the past to obtain favors is irrelevant. This evidence, if admitted, does not make it more or less probable that Hamed was a prisoner touched in a sexual manner by defendant, who was an employee of the Department of Corrections. MCL 750.520c(1)(k). Under MCL 750.520c(1)(k), a defendant's use of force or coercion to initiate the sexual contact is not relevant. This evidence would not help shed light on any material point, which would have made it admissible. *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001).

Moreover, even if relevant, under MRE 404(a)(3), character evidence is not permitted in a case of a sexual conduct crime to prove that the alleged victim acted in conformity on a particular occasion, unless it shows "the source of semen, pregnancy, or disease." MRE 404(a)(3); *People v Morse*, 231 Mich App 424, 430 n 5; 586 NW2d 555 (1998). None of these factors are at issue in this case, and therefore, questioning concerning Hamed's prior activity of exposing her breasts was properly excluded.

#### ii. Letter to Prosecutor

Defendant next argues that the trial court erred in sustaining objections to defense counsel's questioning Hamed about a letter her attorney wrote to the prosecutor regarding a civil case stemming from this incident. Defendant contends this error prevented him from properly confronting Hamed about her possible financial motivation for alleging defendant violated her.

Evidence relating to her attorney's correspondence in a civil suit does not make it more or less probable that Hamed was a prisoner touched in a sexual manner by defendant. MCL 750.520c(k). Nor does it help shed light on any material point, which would have made it admissible. *Aldrich, supra*. Therefore, the trial court did not err in finding that further questioning on this matters was irrelevant. In addition, MRE 602 prohibits a witness from testifying about a matter on which she has no personal knowledge. Hamed testified that she was unaware of the letter and had never seen it before. The trial court did not err in excluding questions based upon this issue.

#### iii. Out of Court Statement

Defendant next argues the trial court erred in not allowing defendant to ask Officer Linda Wells if she "had information from Mr. Reynolds and Mr. Chora that [Hamed] was bragging about [sic] going to make a lot of money." The trial court disallowed the question, stating that it called for hearsay.

Under MRE 802, hearsay is not admissible except as provided by the Michigan Rules of Evidence. The answer to the question would have constituted hearsay, because it was an out of court statement offered for the truth of the matter asserted. Moreover, because Reynolds and Chora both testified in regard to Hamed's statements concerning a potential civil suit, this alleged error is harmless. Therefore, reversal is not required.

#### iv. Victim's Drug Use, Probation Violations, and Prior False Allegations

Defendant next argues the trial court erred in limiting his questioning regarding Hamed's drug use, probation violations, and false allegations. The questions prohibited were general

questions regarding her drug free status in the year following the incident and also her probation violation. To the extent that defense counsel was attempting to discredit Hamed by alleging that she was dishonest about her drug free status, the question was asked and answered twice. Moreover, questions regarding Hamed's alleged probation violation and detainment by the Livingston County Authorities were not relevant to her credibility. These facts do not make it more or less probable that Hamed was a prisoner touched in a sexual manner by defendant, who was an employee of the Department of Corrections. MCL 750.520c(k). Nor do they help shed light on any material point, which would have made them admissible. *Aldrich, supra*.

### III. Motion to Subpoena Medical Records

Next, defendant argues that the trial court erred in denying his motion to subpoena medical records. We disagree.

#### A. Standard of Review

Evidentiary issues, including discovery requests, are reviewed for an abuse of discretion. *People v Stanaway*, 446 Mich 643, 680; 521 NW2d 557 (1994).

#### B. Analysis

Defendant stated that the trial court erred in denying his motion to issue a subpoena for Hamed's Wayne County Jail medical records for discovery purposes. "There is no general constitutional right to discovery in a criminal case . . ." *Stanaway, supra* at 664, quoting *Weatherford v Bursey*, 429 US 545, 559; 97 S Ct 837; 51 L Ed 2d 30 (1977). "Discovery in criminal cases . . . is left to the discretion of the trial court." *Id.* at 680.

Defendant argues that his due process right to discovery of information in the prosecution's possession under *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), was violated. *Brady* requires the disclosure of evidence that might lead a jury to entertain a reasonable doubt about the defendant's guilt. *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998). *Brady* requires that the records within the prosecutor's possession must be turned over to the defendant regardless of whether the defendant has requested the records. *Stanaway, supra* at 666. The prosecutor is not under a duty to allow complete discovery of his files, but must disclose any information that would affect the credibility of his witnesses. *Lester, supra*.

In order to establish a *Brady* violation, a defendant must prove:

(1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*Lester, supra* at 281-282.]

Defendant cannot establish a *Brady* violation. First, the court asked Wells if she had looked at the medical records, and Wells replied that she did not have access to the records. The

state did not have possession of the records. Second, defendant has failed to show that the medical records contained any exculpatory evidence. Third, although defendant did not have the records, the records could have been obtained if defendant had requested a subpoena prior to the motion deadline rather than on the day of trial. The trial court extensively questioned Wells regarding the records. Wells affirmed that she did not use the records in her investigation, she was not hiding or suppressing the records, nor did she have any reason to believe that there were facts relevant to the case in the medical records. There is no indication that had the records been disclosed to the defense, it would have affected the outcome of the proceedings. Thus, defendant has not shown that a due process violation occurred. *Lester, supra*.

Defendant also argues that the trial court violated his due process right by failing to enforce the order of disclosure for *Brady* material by not issuing a subpoena for Hamed's Wayne County Jail medical records. The order, and the motion that the order was based on, only specified a request for records from Livingston County Jail. Because the order does not include the Wayne County Jail records, the trial court did not fail to enforce the order. Further, because discovery in criminal cases is left to the discretion of the trial court, it was within the discretion of the court not to issue a subpoena for medical records on the first day of trial, August 29, 2002, when the deadline for motions was May 17, 2002.

#### IV. Failure to Declare Defense Witness Hostile

Defendant last argues that the trial court committed error requiring reversal in denying defense counsel's request to declare a defense witness hostile. We disagree.

##### A. Standard of Review

A trial court's decision whether to allow a party to ask its own witness leading questions is reviewed for abuse of discretion. *Starr, supra* at 494.

##### B. Analysis

A trial court has broad power to control the manner in which witnesses are examined, including the mode and order of interrogation. *People v Deihm*, 213 Mich App 389; 541 NW2d 566 (1995). "The admission of leading questions is discretionary with the court." *People v Fields*, 49 Mich App 652, 658; 212 NW2d 612 (1973), and MCL 768.24. Therefore, absent a clear abuse of discretion, the trial court's decision on the matter will not be overturned.

MRE 611(c) allows the use of leading questions that are necessary to develop testimony. MRE 611(c)(3) states:

When a party calls a hostile witness, an adverse party or a witness identified with an adverse party, interrogation may be by leading questions. It is not necessary to declare the intent to ask leading questions before the questioning begins or before the questioning moves beyond preliminary inquiries.

The court, in its discretion, can allow a party to impeach his own witness when he is declared to be hostile when the party calling the witness is misled and thereby prejudiced. *People v Stevens*, 230 Mich App 502, 506-507; 584 NW2d 369 (1998).

Defense counsel called Reynolds to testify and attempted to have him considered a hostile witness so that defense counsel could ask leading questions. The trial court denied the request, stating, “[t]here is no such thing.” MRE 611(c)(3) states that when a party calls a hostile witness or a witness identified with an adverse party, interrogation may be by leading questions. Here, Reynolds was Hamed’s boyfriend. Reynolds also could not remember several things that he had told detectives regarding Hamed’s comments about the incident. Reynolds arguably could be identified with the prosecution.

However, even if the trial court erred by not recognizing Reynolds could be a hostile witness, the alleged error is harmless. When error occurs in the lower court, a reviewing court must first determine whether the error was constitutional or nonconstitutional. *People v Cornell*, 466 Mich 335, 363; 646 NW2d 127 (2002). The evidentiary error in this case is nonconstitutional. *People v Whittaker*, 465 Mich 422, 426; 635 NW2d 687 (2001). A preserved nonconstitutional error is subject to harmless error analysis. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). Defendant must establish that it is more probable than not that the error undermined reliability in the verdict. *Carines, supra; Lukity, supra* at 495.

Here, the trial court allowed defense counsel to ask numerous leading questions to Reynolds. Where defense counsel was prohibited from asking leading questions to impeach Reynolds, defense counsel called other witnesses, including Wells and Donohue, to impeach him. The evidence that defense counsel attempted to elicit through the leading questions was put into evidence through other sources. Wells and Donohue both testified that Reynolds called the sheriff’s office and stated that Hamed informed him that she was going to make a lot of money from this incident. Defendant does not indicate on appeal what further evidence he could have elicited by asking Reynolds leading questions as a hostile witness. Because defendant cannot establish that it is more probable than not that the error undermined reliability in the verdict, the error is harmless. *Carines, supra; Lukity, supra*.

Affirmed.

/s/ Brian K. Zahra  
/s/ Michael J. Talbot  
/s/ Kurtis T. Wilder