S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DUSTIN H. WIECEK,

Defendant-Appellant.

UNPUBLISHED
February 8, 2005

No. 247596
Wayne Circuit Court
LC No. 00-005854

Before: Wilder, P.J., and Hoekstra and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(g) (sexual penetration while causing personal injury and knowing or having reason to know that the victim was physically helpless), but acquitted of mingling poison or a harmful substance with a drink, MCL 750.436, and an additional charge of first-degree CSC (sexual penetration during the commission of a felony, i.e., poisoning). He was sentenced to a term of twenty-seven months to fifteen years' imprisonment. He appeals as of right. We affirm.

I

Defendant first argues that misconduct by the prosecutor denied him a fair trial. Defendant preserved only two of his allegations of misconduct with an appropriate objection at trial. We review these preserved claims de novo to determine whether defendant was denied a fair and impartial trial. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003); *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). We must examine the record and evaluate the prosecutor's conduct in context. *Id.*; *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). We review the unpreserved allegations of misconduct for plain error (i.e., clear or obvious error) affecting defendant's substantial rights (i.e., affecting the outcome of the proceeding). *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Reversal is not warranted if the prejudicial effect of any improper comments could have been cured by a timely instruction. *Watson*, *supra* at 586; *People v Rivera,* 216 Mich App 648, 651-652; 550 NW2d 593 (1996).

A. Preserved Claims of Alleged Misconduct

Defendant argues that the prosecutor improperly elicited evidence that he chose to exercise his constitutional rights to remain silent, to have the effective assistance of counsel, and to present a defense. The basis for this claim is a brief exchange between the prosecutor and a

police officer wherein the officer stated that he did not recall talking to defense counsel, but may have received a telephone call from him. The prosecutor then asked the officer whether defense counsel ever showed up with defendant for an interview. Before the officer answered, the trial court sustained defense counsel's objection to the question. There was no further questioning on this subject. Contrary to what defendant argues, the prosecutor did not improperly suggest that the jurors could consider defendant's exercise of his right to remain silent and right to an attorney to infer defendant's guilt. Given the brief nature of the exchange, and that the trial court sustained defense counsel's objection, any prejudicial effect of the prosecutor's question was eliminated and defendant was not denied a fair trial. *Watson*, *supra* at 586.

Defendant also claims that it was improper for the prosecutor to state in rebuttal argument that defense counsel had "crossed the line" when he cross-examined the victim concerning the death of her mother. The statement was made in the context of urging the jury to reject any suggestion that the death of the victim's mother had any relevancy to the case. Considered in this context, the statement was not improper.

B. Unpreserved Claims of Alleged Misconduct

Defendant argues that the evidence did not support the prosecutor's assertion in her opening statement that he obtained the recipe for GHB from the Internet. Defendant also contends that there was no evidence to support the prosecutor's closing argument that GHB was easy to make and that a person could easily get a hold of it.

Opening statement is the appropriate time to state the facts that a prosecutor believes will be proven at trial. But even if the facts at trial differ from those stated by the prosecution during opening statement, reversal is not warranted absent a showing that the prosecutor acted in bad faith and that the defendant was prejudiced. *People v Wolverton*, 227 Mich App 72, 77-78; 574 NW2d 703 (1997). In closing argument, a prosecutor may not make a statement of fact to the jury that is unsupported by the evidence, *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994), but is free to argue the evidence and all reasonable inferences arising from it as they relate to her theory of the case, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

In this case, while there was no direct evidence that defendant obtained a recipe for GHB from the Internet, the essence of the prosecutor's remarks in opening statement was only that defendant had knowledge about computers and had access to information about GHB via the Internet. In this context, these remarks do not constitute plain error. Further, because defendant was acquitted of the two charges involving his alleged use of GHB, it is apparent that the challenged remarks during opening statement and closing argument did not affect defendant's substantial rights. Therefore, the remarks do not warrant reversal.

Defendant also claims that the prosecutor misrepresented the testimony of defense expert, Dr. Bernard Eisenga, when she stated during closing argument that he had testified that it was not possible to lose bowel control in an alcoholic blackout. As defendant notes, Dr. Eisenga testified that a person could lose bowel control as a result of intoxication. Nonetheless, reversal is not warranted. The prosecutor's statement was made in the context of arguing that the only explanation for the victim's loss of bowel control was the ingestion of GHB. Because the jury acquitted defendant of the two charges involving the alleged use of GHB, it is clear that defendant's substantial rights were not affected by the misstatement.

Defendant also contends that police witnesses improperly called into question his exercise of his Fifth and Sixth Amendment rights during their testimony. Specifically, defendant contends that Officer Newsome improperly implied that he was guilty by mentioning that he had "lawyered up, you can't talk to him." This testimony was given as part of a lengthy response to the prosecutor's question inquiring how Officer Newsome first became aware of the case. There is no indication that the challenged testimony was anticipated by the prosecutor. Misconduct may not be based on a prosecutor's good-faith effort to admit evidence. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Further, the context of the response was not intended to suggest that defendant was guilty because he had obtained a lawyer. Thus, plain error affecting defendant's substantial rights has not been shown.

Defendant also asserts that Officer Newsome's response to defense counsel's questioning constituted prosecutorial misconduct. We disagree. Officer Newsome testified that she did not try to obtain any containers from defendant's home during her investigation because defendant already had a lawyer by that time and had invoked his Fifth Amendment right, and therefore the police didn't want to speak to him at that point. Because this testimony was elicited by defense counsel, it does not support a claim of prosecutorial misconduct.

Nor did plain error occur when Officer Newsome testified on rebuttal that she did not attempt to interview defendant because he had already secured legal representation. The testimony was elicited in the context of explaining why the police contemplated attempting a pretext telephone call to defendant by the victim. Viewed in context, there was no attempt to suggest that defendant's exercise of either his right to silence or his right to counsel implied he was guilty.

Defendant also argues that the prosecutor improperly commented on his right to counsel during closing argument when she stated that defendant obtained a lawyer the day after the victim went to the hospital. However, the remarks were made in the context of explaining the sequence of events that led the victim to report the incident to the police. Viewed in context, defendant has failed to show that the remarks constituted plain error.

Defendant also argues that it was improper for the prosecutor to elicit testimony from Catherine Zeni that defendant's mother had consulted with her about hiring an attorney for defendant and that Zeni and her son both talked to defense counsel. In this instance, defendant has abandoned this issue by simply stating the argument without proper support. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). In any event, the testimony was relevant to the issue of Zeni's bias toward defendant and her credibility as a witness and did not amount to plain error.

Defendant also contends that the prosecutor improperly commented on his right to counsel during her questioning of a defense expert, Dr. Eisenga. During the prosecutor's questioning, Dr. Eisenga admitted that he had reassessed the case as it progressed in response to requests by defense counsel. The questioning was relevant to the weight and credibility of Dr. Eisenga's testimony, and we find nothing in the testimony that could be considered an improper comment on defendant's right to counsel.

Next, defendant argues that the prosecutor improperly attacked defense counsel in closing argument by stating that counsel had introduced "new testimony" in summarizing defendant's

mother's testimony. A prosecutor may not attack the credibility of defense counsel, *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996), or suggest that defense counsel is intentionally attempting to mislead the jury, *Watson*, *supra* at 592. Here, however, the prosecutor was merely urging the jury to reject defense counsel's characterization of the testimony as unsupported by the evidence. The remarks were not plain error. We also reject defendant's claim that the prosecutor improperly attacked defense counsel during her redirect examination of the victim's friend, Amber Jbara. Viewed in context, the prosecutor was attempting to clarify Jbara's testimony regarding whether the victim told her that defendant had sex with her while she was unconscious. The questioning did not amount to plain error.

Defendant also argues that the prosecutor improperly vouched for her witnesses and resorted to improper bolstering of testimony during closing argument. Prosecutorial vouching occurs when a prosecutor makes personal assurances of a witness' veracity or when a prosecutor claims to have personal information of which the jury is unaware, lending to the credibility of a witness. *Bahoda*, *supra* at 276. A prosecutor must argue the evidence and may not request that the jury find the defendant guilty based on the prosecutor's special knowledge or the prestige of her office. *People v Reed*, 449 Mich 375, 398-399; 535 NW2d 496 (1995). Here, the prosecutor did not suggest that she had special knowledge concerning the victim's truthfulness or ask the jury to convict defendant on the basis of the prosecutor's personal knowledge. *Bahoda*, *supra* at 276, 286-287. Indeed, the prosecutor made the point of reminding the jurors that they had to decide the credibility issue. Further, the prosecutor did not resort to improper bolstering by stating that the victim had consistently testified that she never had sexual contact with defendant before the charged assault. Although defendant contends that the victim admitted engaging in sexual contact while in the hot tub before the charged assault, the victim consistently refused to characterize that encounter as involving sexual contact. The prosecutor was entitled to argue the testimony in this light during closing argument. Therefore, defendant has not shown that the prosecutor's remarks were improper.

Defendant also argues that the prosecutor improperly bolstered her case by eliciting testimony through Officer Newsome that the prosecutor's office had approved the warrant to search defendant's house and seize his computer, that the warrant was signed by a magistrate, and that a judge at the preliminary examination found sufficient evidence to allow the case to proceed to trial. As our Supreme Court observed in *People v Saffold*, 465 Mich 268, 276; 631 NW2d 320 (2001), quoting *In re Guilty Plea Cases*, 395 Mich 96, 125; 235 NW2d 132 (1975), "the presumption of innocence is 'at the core of our criminal process. . . ." The presumption of innocence can be overcome only by proof beyond a reasonable doubt of every element of every offense. See *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970); *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994). Here, defendant has failed to show plain error affecting his substantial rights because there is no indication that the prosecutor suggested that her burden of proof was less than beyond a reasonable doubt in order to convict defendant of the charged offenses. Moreover, the fact that the jury acquitted defendant of two of the charges indicates that it was not misled in this regard.

Defendant also contends that the prosecutor improperly shifted the burden of proof when she asked the jury in her opening statement to "listen carefully . . . if the defendant gets up here and starts talking about consent, that she consented, and the ability of somebody like that to consent in that sort of helpless state." Again, defendant has failed to show a plain error affecting

his substantial rights. The prosecutor was merely alerting the jury to the possibility that defendant would argue consent, and the importance of considering that issue when evaluating the witnesses and their testimony.

II

Next, defendant argues that he was denied the effective assistance of counsel because the trial court ordered defense counsel not to object to the prosecutor's rebuttal closing argument.

When defense counsel objected to a prosecutorial remark at the beginning of the prosecutor's rebuttal closing argument, the trial court admonished counsel, referring to a "centuries honored rule among trial lawyers not to interfere with another lawyer's argument." Plaintiff argues that this issue is more properly analyzed as one involving judicial misconduct. *Cain v Dep't of Corrections*, 451 Mich 470, 495; 548 NW2d 210 (1996); *People v Conyers*, 194 Mich App 395; 487 NW2d 787 (1992). Either way, and while we agree that the trial court erred insofar that it suggested that it was improper for defense counsel to object to perceived improper remarks by the prosecutor, reversal is not required. Defendant did not object to the court's conduct below, nor did he subsequently make a record complaining of any perceived misconduct by the prosecutor during her rebuttal argument. Further, the only objectionable remarks that defendant has identified on appeal are those discussed in part I, *supra*, wherein we concluded that defendant failed to show any improper, prejudicial conduct by the prosecutor. Under these circumstances, the trial court's error does not require reversal.

III

Next, defendant argues that the trial court erred in excluding evidence of statements from the victim's private journals. A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

The trial court properly determined that the evidence was not admissible for the purpose of proving the victim's character under MRE 404(a)(2), as in effect at that time,[1] because the rule expressly precluded such evidence in a prosecution for criminal sexual conduct. Further, to the extent the journal statements reflect evidence of past sexual conduct, because they were not offered as evidence of the victim's past sexual conduct with defendant, or to show the source or origin of semen, pregnancy, or disease, they were inadmissible under MCL 750.520j(1).

Defendant argues that his constitutional right of confrontation was violated to the extent that he was precluded from cross-examining the victim concerning the journal statements. Although a trial court's limitation of a defendant's right of cross-examination may implicate the associated right of confrontation, *People v Frazier (After Remand)*, 446 Mich 539, 543; 521 NW2d 291 (1994), "neither the Confrontation Clause nor due process confers an unlimited right to admit all relevant evidence or cross-examine on any subject." *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993).

[1] The rule was amended, effective September 1, 2001, to limit the accused's use of evidence of the victim's character to a character trait for aggression in a homicide case.

In *People v Hackett*, 421 Mich 338, 348; 365 NW2d 120 (1984), our Supreme Court recognized that in certain limited situations, evidence barred by the rape-shield statute may not only be relevant, but its admission may be required to preserve a defendant's constitutional right of confrontation. The Court explained that a defendant must initially make a showing of relevancy before invoking the constitutional standard. *Id.* at 350. "If there is a sufficient offer of proof as to a defendant's constitutional right to confrontation, as distinct simply from use of sexual conduct as evidence of character or for impeachment," the trial court shall then determine the admissibility of such evidence in light of the constitutional inquiry. *Id.* In *Hackett*, where a defendant sought to introduce evidence of the complainant's reputation for unchastity, a specific instance of the complainant's sexual conduct in which she allegedly met a man in a bar and left with him for consensual sex at a motel, and evidence of a statement made by the complainant that she was not getting enough sexual satisfaction from her husband for the sole purpose of showing consent, the Court concluded that the minimal threshold of relevancy was not met. The Court explained:

> As a general rule, evidence of a complainant's prior sexual unchastity, in the form of reputation evidence or a specific instance of conduct, has little or no relevancy to the issue of complainant's consent with defendant as to the incident in question.
>
> * * *
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> Therefore, absent extraordinary circumstances, a complainant's reputation for unchastity or specific instances of complainant's past sexual conduct with third persons is ordinarily irrelevant and inadmissible to show consent. [*Id*. at 354-355.]

In this case, the evidence in question, which was similarly offered to show consent, is written in the form of a poem and is undated. Moreover, it is not apparent that the matters described actually occurred. Even if they did, as in *Hackett*, the evidence had little or no relevancy to the issue of the victim's consent with defendant with regard to the charged incident.

Defendant also argues that the journal evidence was relevant to the victim's motive because it was only after the victim was informed that she had been subjected to GHB poisoning that she claimed that a crime had been committed. Defendant's theory is that the victim "grasped that as her excuse for her behavior rather than having to deal with the fact she has a drinking problem." However, nothing in the journal excerpts tends to establish or make more likely than not this theory of motive, and therefore the exclusion of the journal excerpts neither abridged defendant's right of confrontation, nor constituted an abuse of discretion by the trial court.

IV

Defendant argues that the trial court's questioning of a defense witness, Catherine Zeni, pierced the veil of judicial impartiality and invaded the province of the jury. Because defendant did not object to the trial court's questions at trial, we review this unpreserved issue for plain error affecting defendant's substantial rights. *Carines*, *supra* at 764-765.

A trial court may question a witness to clarify testimony or elicit additional relevant testimony, provided its questioning does not pierce the veil of judicial impartiality. MRE 614(b); *People v Davis*, 216 Mich App 47, 52; 549 NW2d 1 (1996); *Conyers*, *supra* at 404. "The trial court must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial." *Id.* at 405. Here, defendant complains of the trial court's use of the adjective "pretty" when referring to Officer Newsome in its questioning of defense witness Zeni. We find no merit to defendant's claim that this reference to Officer Newsome's physical appearance improperly expressed a belief, one way or the other, concerning Officer Newsome's credibility as a witness. Defendant has failed to show error, plain or otherwise.

V

Defendant argues that the trial court erroneously allowed Officer Newsome to provide hearsay testimony to the effect that she had contacted three medical experts, who each confirmed that the victim's symptomology was consistent with the symptomology for GHB ingestion. '"Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is not admissible as substantive evidence absent an exception. MRE 802; *People v Poole*, 444 Mich 151, 159; 506 NW2d 505 (1993).

We agree that the challenged testimony was hearsay to the extent that it was offered to show that the victim's symptomology was consistent with the symptomology for GHB. But the error was harmless. An evidentiary error is not a ground for reversal unless, after an examination of the entire record, it affirmatively appears that it is more probable than not that the error was outcome determinative. *Lukity*, *supra* at 495-496; *People v Smith*, 243 Mich App 657, 680; 625 NW2d 46 (2000). The erroneous admission of hearsay evidence "can be rendered harmless error where corroborated by other competent testimony." *People v Hill*, 257 Mich App 126, 140; 667 NW2d 78 (2003). In this case, the prosecution presented Dr. Julia Pearson, who testified at length regarding the symptoms of GHB ingestion, and the victim's symptomology. In light of Dr. Pearson's cumulative testimony, it is not more probable than not that Officer Newsome's brief hearsay testimony affected the outcome.

VI

Defendant next argues that there was insufficient evidence to support his first-degree CSC conviction. We disagree. In reviewing the sufficiency of the evidence, this Court must view the evidence de novo in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004); *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). Circumstantial evidence and reasonable inferences drawn from the evidence can constitute satisfactory proof of the elements of a crime. *Id.*; *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000).

Defendant was convicted of violating MCL 750.520b(1)(g), which provides:

> A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:
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> * * *
>
> (g) The actor causes personal injury to the victim, and the actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

For purposes of this statute, "physically helpless" means that the victim is unable to communicate unwillingness to an act, as when the victim is asleep or unconscious. *People v Perry*, 172 Mich App 609, 622; 432 NW2d 377 (1988). Whether a defendant knows or has reason to know that the victim is physically helpless is determined by an objective reasonable person standard. *People v Baker*, 157 Mich App 613, 615; 403 NW2d 479 (1986).

Here, defendant contends that the evidence was insufficient to establish that the victim was physically helpless because the experts disagreed about the acceptable cut-off levels for differentiating endogenous GHB from exogenous GHB. We disagree, because the evidence was sufficient to show that the victim was physically helpless, regardless of her ingestion of GHB. Apart from any GHB ingestion, there was evidence that the victim became unconscious after drinking rum, beer, and wine. The victim testified that she had no memory of the sexual encounter and blacked out for an approximate three-hour period. When she awoke, defendant told her that he had lost his virginity. Viewed most favorably to the prosecution, the evidence was sufficient to establish that defendant sexually penetrated the victim while she was "physically helpless." *Perry*, *supra* at 622.

VII

Next, defendant argues that he was denied the effective assistance of counsel. Because defendant did not raise this issue in an appropriate motion in the trial court, our review is limited to errors apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). A defendant bears a heavy burden of overcoming the presumption that counsel was effective and must meet a two-pronged test to establish ineffective assistance of counsel. *Strickland v Washington*, 466 US 668, 687-689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). First, the defendant must show that counsel's performance fell below an objective standard of reasonableness under the circumstances according to prevailing professional norms. *Id*. at 687; *People v Pickens*, 446 Mich 298, 311; 521 NW2d 797 (1994). Second, the defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial; in other words, he must show a reasonable probability that, but for counsel's unprofessional error or errors, the trial's outcome would have been different. *Strickland, supra* at 687; *Pickens, supra* at 314; *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000).

Defendant argues that trial counsel was ineffective because he failed to seek admission of the victim's journal excerpts under MRE 406 and MRE 404(b), and also failed to use them for impeachment purposes once the complainant stated that acting sexually was not in her character.

MRE 406 provides that evidence of habit is relevant to prove that a person's conduct on a particular occasion was in conformity with the habit. For evidence of habit to be admissible, the evidence must establish a set pattern or demonstrate that an act was done routinely or performed on countless occasions. *Laszko v Cooper Laboratories, Inc*, 114 Mich App 253, 256; 318 NW2d 639 (1982). Here, evidence that the victim wrote about three separate and unsubstantiated episodes of excessive drinking, in a journal, in the form of a poem, falls short of establishing that the victim actually engaged in that behavior routinely or on countless occasions as a matter of habit. Thus, it is not apparent that counsel was ineffective for failing to offer the evidence under this rule.

Defendant also contends that the journal excerpts were admissible under MRE 404(b) because "the complainant's past experiences with alcoholic black outs could be used to prove the reason why she had no memory of the events of June 19, 1999 was not because defendant placed GHB in her wine but because she was experiencing an alcoholic black out." MRE 404(a) addresses character evidence generally, whereas MRE 404(b) addresses evidence of other crimes, wrongs, or acts. It is difficult to characterize the type of writings involved here, journal entries in the form of poems, as evidence of other crimes, wrongs, or acts. In any event, to the extent defendant argues that the journal excerpts were admissible for the limited purpose of attributing the victim's memory loss to an alcoholic blackout, as opposed to GHB poisoning, it is apparent that defendant was not prejudiced by any alleged deficiency on counsel's part because he was acquitted of the charges involving his alleged use of GHB.

Defendant also asserts that counsel was ineffective for not offering the journal excerpts for impeachment purposes. Defendant offers no separate argument for this theory, but merely refers to his arguments that are addressed in part III, *supra*. Because we concluded in part III that the journal excerpts were not admissible, we similarly conclude here that there is no basis for finding that counsel was ineffective.

Defendant also claims that counsel was ineffective for failing to object to the various instances of misconduct by the prosecutor discussed in part I, *supra*. There, however, we rejected most of defendant's claims of misconduct. Furthermore, to the extent that some of the prosecutor's conduct could be considered improper, it did not affect the outcome. Accordingly, defendant has not established that he is entitled to a new trial due to ineffective assistance of counsel.

VIII

Next, defendant argues that his pretrial motion to exclude expert testimony concerning the cut-off level for differentiating endogenous from exogenous GHB, and to exclude the GHB evidence because of defects in the chain of custody, was erroneously denied.

After reviewing the record of the *Davis-Frye*[2] hearing that was conducted in connection with this issue, we are not persuaded that the trial court clearly erred in finding that the expert

[2] *People v Davis*, 343 Mich 348; 72 NW2d 269 (1955); *Frye v United States*, 54 App DC 46; 293 F 1013 (1923).

testimony was admissible, *People v Holtzer*, 255 Mich App 478, 484; 660 NW2d 405 (2003), or in concluding that the alleged defects in the chain of custody affected only the weight of the GHB evidence, not its admissibility, *People v White*, 208 Mich App 126, 132-133, 527 NW2d 34 (1994). Even if the court erred in allowing this evidence, however, the record clearly establishes that it did not affect the outcome, because defendant was acquitted of the two charges involving his alleged use of GHB.

IX

Finally, defendant challenges the constitutionality of Michigan's Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*., arguing that it does not meet the requirements of procedural due process, US Const, Ams V and XIV, because the Legislature failed to provide a mechanism whereby a person convicted of a listed offense has the opportunity to prove that he is not a danger to the community or to rebut the presumption that because he was convicted he therefore poses a future danger to the community. Courts considering this issue have already rejected this constitutional challenge. *In re Wentworth*, 251 Mich App 560, 563-566; 651 NW2d 773 (2002); *Fullmer v Michigan Dep't of State Police*, 360 F3d 579 (CA 6, 2004); see also *Connecticut Dep't of Public Safety v Doe*, 538 US 1; 123 S Ct 1160; 155 L Ed 98 (2003) (upholding Connecticut's sex offender registration act in the face of a similar constitutional challenge), and *Smith v Doe*, 538 US 84; 123 S Ct 1140; 155 L Ed 2d 164 (2003) (rejecting constitutional challenge to Alaska's sex offender registration act). In light of these authorities, we similarly reject defendant's constitutional challenge to the SORA.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Joel P. Hoekstra
/s/ Donald S. Owens