STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 21, 2005
v	No. 255129 Macomb Circuit Court
ROBERT ALEXANDER MOURELO, Defendant-Appellant.	LC No. 2001-003753-FC

Before: Gage, P.J., and Whitbeck, C.J., and Saad, J.

PER CURIAM.

Defendant Robert Mourelo appeals as of right from his jury trial conviction of first-degree home invasion[1] and fourth-degree criminal sexual conduct.[2] The trial court sentenced Mourelo as a second habitual offender[3] to concurrent prison terms of 9 to 30 years for the home invasion conviction and 1½ to 3 years for the CSC conviction. We affirm.

I. Basic Facts And Procedural History

The complainant lived with Kris Farley, Mourelo's brother-in-law, and the infant son she had with Farley. On November 19, 2001, the complainant was home alone with her child when an assailant wearing a ski mask entered her apartment through a basement window. The assailant got into the bed where the complainant was sleeping, rolled her onto her back, and began to fondle her breasts. The complainant awoke, screamed for help, and bit the assailant as he tried to silence her by putting his hand over her mouth. The assailant pushed her into the living room, pushed her face into the sofa, rubbed her buttocks, and digitally penetrated her anus. The complainant testified that the assailant put his fingertip into her anus "just a little bit, enough to cause pressure." The complainant recognized the assailant as Mourelo by his eyes, clothes, shoes, hair, weight, and hairy legs. When she said Mourelo's name, "Rob," he fled from the home.

[1] MCL 750.110a(2).

[2] MCL 750.520e(1)(a) (force or coercion).

[3] MCL 769.10.

The police found a partial latent fingerprint by the open window, but it was not suitable for identification. Police detectives found no DNA evidence in the apartment, or on Mourelo's fingernails, to link him to the crime.

At trial, defense counsel elicited discrepancies between the complainant's testimony and her police statement. The complainant admitted that Mourelo's eyes appeared "greenish blue" in color, in contrast to her description to the police as "bright brown" or "hazel." She admitted that she did not tell the police immediately following the incident that she recognized Mourelo by the clothes he wore. She acknowledged that her attacker was not wearing glasses, though Mourelo commonly wore them. However, she stated she was certain that Mourelo was the attacker. The jury convicted Mourelo of CSC IV and first-degree home invasion, but acquitted him of an additional charge of CSC I.[4]

II. Ineffective Assistance Of Counsel

A. Standard Of Review

To establish ineffective assistance of counsel, Mourelo must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted.[5] Because Mourelo did not move for a new trial or an evidentiary hearing pursuant to *People v Ginther*,[6] our review is limited to mistakes apparent on the record.[7]

B. Failure To Object To Inadmissible Hearsay

Mourelo argues that trial counsel was ineffective for failing to object to testimony by Renae Diegel, a sexual assault nurse examiner who examined the complainant after the incident. Diegel repeated the complainant's description of the assault, and testified that the complainant "verbalized fear of Rob." Mourelo argues that Diegel's testimony regarding the complainant's statements was inadmissible hearsay, which would have been excluded had counsel objected.

Because Mourelo's ineffective assistance claim is predicated on defense counsel's failure to object to Diegel's testimony, a threshold question is whether the testimony was admissible. Hearsay is defined as "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."[8] Hearsay is not admissible except as provided by the rules of evidence.[9] The complainant's statements

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[4] An additional charge of assault with intent to commit CSC, MCL 750.520g(1), was dismissed before trial.

[5] *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001).

[6] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

[7] *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

[8] MRE 801(c); *People v Chavies,* 234 Mich App 274, 281; 593 NW2d 655 (1999).

[9] MRE 802; *Chavies, supra*.

describing the assault, her injuries, and her symptoms were admissible under MRE 803(4), which provides that the following statements are not excluded by the hearsay rule:

> Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment.

Mourelo argues that MRE 803(4) does not apply, because the complainant did not make the statements while obtaining medical treatment or diagnosis. We disagree. Although Mourelo contends that Diegel conducts the exams to assist criminal investigations or prosecutions, she testified that she receives examination referrals from "either law enforcement *or* hospitals"; she did not state that the only purpose of the exam was to assist a criminal investigation. On the contrary, she stated that she takes a patient's history before the examination to "assess[] a diagnosis and treatment plan of how to do my care for that patient."

In *People v McElhaney*,[10] this Court held that the complainant's statements to a physician's assistant were admissible under MRE 803(4) because they allowed the physician's assistant "to structure the examination and questions to the exact type of trauma that the complainant had recently experienced." Although *McElhaney* involved a child victim, the Court's analysis applies generally to examinations following a sexual assault and, therefore, applies to the instant case.[11] The complainant's statements to Diegel describing her injuries and symptoms were thus admissible under this rule.[12]

However, the complainant's statement that she was frightened of "Rob" was not relevant to obtaining treatment and diagnosis. Although the Michigan Supreme Court held in *People v Meeboer*[13] that a victim's statement identifying a perpetrator to a medical practitioner was admissible under MRE 803(4), this case is factually distinguishable. In *Meeboer*, the Court held that two child victims' statements identifying the assailant were medically necessary to help the doctor scan for sexually transmitted diseases and to help other authorities remove the children from abusive environments.[14] There were no such concerns in the present case.

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[10] *People v McElhaney*, 215 Mich App 269, 282-283; 545 NW2d 18 (1996).

[11] See *People v Crump*, 216 Mich App 210, 212; 549 NW2d 36 (1996) (holding that a sexual assault victim's descriptions to medical personnel of the beatings that led to her injuries were "well within the parameters of MRE 803(4)").

[12] The prosecutor erroneously comments that this Court reached a contrary conclusion in *People v McLaughlin*, 258 Mich App 635, 651; 672 NW2d 860 (2003). The Court in *McLaughlin* did not hold that a *victim's* statements to a nurse sexual assault examiner about her injuries and symptoms were inadmissible under MRE 803(4). Rather, the Court held that the *examiner's* out of court statements in medical records were inadmissible under MRE 803(4), but were admissible under the business record exception, MRE 803(6).

[13] *People v Meeboer (After Remand)*, 439 Mich 310; 484 NW2d 621 (1992).

[14] *Id*. at 334-335, 338.

Yet the complainant's statement referring to "Rob" was arguably admissible under MRE 803(2), the "excited utterance" or spontaneous statement exception. MRE 803(2) permits hearsay that is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." The trial court's determination as to whether the declarant was still under the stress of the event is given wide discretion.[15] In *People v Smith*,[16] a mother recounted her son's description of the sexual assault that he had endured the previous night, ten hours prior to their conversation. The Court held that this testimony was admissible under the spontaneous statement exception.[17]

Here, Diegel testified that the complainant was anxious and tearful during her physical examination when she recounted the incident and verbalized her fear of "Rob." As in *Smith*, the exam took place the morning after her nighttime assault. These circumstances suggest that the complainant was still under the stress of the assault when she made this statement and the prosecutor would likely have been able to establish a foundation for allowing the statement under MRE 803(2) had defense counsel objected.

Further, even if the testimony were inadmissible, harmless error review requires reversal only if the error is prejudicial.[18] Mourelo has not shown that he was prejudiced by Diegel's testimony. Mourelo disputed the complainant's accusation that he assaulted her, but not her claim that she had been assaulted, so complainant's statements to Diegel about her injuries were not prejudicial to his defense. Moreover, the complainant's statements to Diegel, including the statement that she feared "Rob," were merely cumulative to her own testimony. In *People v Crump*,[19] where statements made by the complainant to a nurse were cumulative to the complainant's own testimony, the court held that any error in admitting those hearsay statements was harmless. Therefore, assuming *arguendo* that Diegel's testimony did not fall under the excited utterance exception, we find no prejudice requiring reversal because Diegel's testimony was cumulative to that of the complainant.

In conclusion, Diegel's testimony recounting the complainant's descriptions of her injuries and the sexual assault was admissible under the medical exception to the hearsay rule. Diegel's testimony recounting complainant's reference to "Rob" as her assailant would likely be admissible under the excited utterance exception had defense counsel objected to that testimony. Even if the reference to "Rob" were inadmissible testimony, allowing that testimony was a harmless error. Therefore, Mourelo cannot satisfy the first prong of the ineffective assistance test because he has failed to show that his counsel's performance was objectively unreasonable. Counsel is not required to raise meritless or futile objections.[20] Mourelo has thus failed to establish ineffective assistance of counsel.

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[15] McCormick, Evidence (3d ed), §297, p 857.

[16] *People v Smith*, 456 Mich 543; 581 NW2d 654 (1998).

[17] *Id*. at 552-554.

[18] *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996).

[19] *Crump*, *supra* at 212.

[20] *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

C. Failure To Investigate

Mourelo also argues that trial counsel was ineffective for failing to fully investigate the case, and presents numerous examples of how a more thorough investigation would have led to exculpatory evidence. However, Mourelo's claims are based on evidence that is not part of the trial court record. Because Mourelo did not attempt to raise these issues in a motion for a new trial or *Ginther* hearing, we are unable to consider these claims.[21]

D. Failure to Call Expert Witness

Mourelo also argues that defense counsel should have called an expert witness to testify about the general weaknesses of eyewitness identification testimony. This Court rejected a similar argument in *People v Cooper*,[22] where the defendant argued on appeal that his trial counsel provided ineffective assistance by failing to present expert psychiatric testimony explaining how the circumstances of the shooting could have impaired the complainant's perception, memory, and ability to recognize the shooter. The Court reasoned that defense counsel had been able to challenge the complainant's identification of the defendant on cross-examination without expert testimony, and "may reasonably have been concerned that the jury would react negatively to perhaps lengthy expert testimony that it may have regarded as only stating the obvious: memories and perceptions are sometimes inaccurate."[23]

These considerations are equally applicable here. Defense counsel succeeded in highlighting discrepancies between the complainant's description of the assailant's eyes and Mourelo's eye color, and also showed that she failed to tell the police that she recognized Mourelo's clothes. The jurors could understand, as a matter of common sense, that a person in the complainant's position could be mistaken. Furthermore, the need for such expert testimony was less compelling here, because the complainant did not identify a stranger, as in *Cooper*, and the complainant had a good opportunity to observe her attacker's eyes, build, and clothes after she turned on the light. Thus, Mourelo's contention that his counsel provided ineffective assistance due to failure to call an expert witness is without merit.

E. Other Claims Of Ineffective Assistance

Mourelo raises numerous other claims of ineffective assistance, mainly related to his theory that the complainant's live-in partner committed the assault and that trial counsel was ineffective in failing to investigate and assert this and other exculpatory theories. Since there is no record of support for these remaining claims of ineffective assistance, and Mourelo failed to raise them in a motion for a new trial or *Ginther* hearing, appellate relief is not warranted.[24]

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[21] *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d (2002).

[22] *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999).

[23] *Id*. at 658.

[24] *Rodriguez*, *supra* at 38.

III. Instructional Error

Mourelo raises two claims of instructional error. He argues that the trial court's instruction on reasonable doubt diluted the burden of proof. He also claims that the trial court erred by giving CJI2d 20.25, which instructs that a complainant's testimony alone is sufficient to prove a CSC charge, provided it establishes the Mourelo's guilt beyond a reasonable doubt. However, Mourelo not only failed to object to these instructions, he expressed satisfaction with the instructions as given. He has therefore waived these claims, thus extinguishing any error.[25]

IV. Inconsistent Jury Verdict

Mourelo argues that the jury returned an impermissible compromise verdict, because it inconsistently convicted him of first-degree home invasion, but acquitted him of the predicate felony of CSC I. First-degree home invasion is statutorily defined as follows:

> A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:
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> (a) The person is armed with a dangerous weapon.
>
> (b) Another person is lawfully present in the dwelling.[26]

The jury acquitted Mourelo of the first-degree CSC felony charge, but convicted him of fourth-degree CSC, a misdemeanor. However, the elements of first-degree home invasion are satisfied if the defendant unlawfully enters a dwelling "with intent to commit a felony, larceny, or *assault*," or if the defendant commits a "felony, larceny, *or assault*" while present in the dwelling (emphasis added). In *People v Sands*,[27] this Court held that the language of MCL 750.110a(2) permits misdemeanor larcenies and misdemeanor assaults to serve as predicate offenses for first-degree home invasion.[28] In *People v Musser*,[29] this Court held that fourth-degree CSC constitutes an "assault" within the meaning of the statute and, therefore, constitutes a predicate offense for first-degree home invasion. Therefore, the jury's rejection of the felony CSC charge is not inconsistent with the first-degree home invasion conviction, because fourth-degree CSC serves as a sufficient predicate offense.

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[25] *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000); *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2002).

[26] MCL 750.110a(2).

[27] *People v Sands*, 261 Mich App 158; 680 NW2d 500 (2004).

[28] *Id*. at 163.

[29] *People v Musser*, 259 Mich App 215, 221-222; 673 NW2d 800 (2003).

V. Insufficient Evidence To Support Convictions

A. Standard Of Review

Mourelo argues that the evidence was insufficient to support his convictions of first-degree home invasion and fourth-degree CSC. Although Mourelo frames this issue as one challenging the sufficiency of the evidence, in substance it primarily challenges the verdict as being contrary to the great weight of the evidence. Mourelo does not focus on deficiencies in the prosecutor's proofs of the elements of first-degree home invasion or CSC IV, as would be required for a successful challenge to the sufficiency of the evidence.[30] Rather, he argues that the jury's verdict cannot stand because the complainant's accusations cannot reasonably be believed.[31] Lack of witness credibility does not establish insufficiency of the evidence, because this Court defers to the jury's assessment of the credibility of witnesses.[32]

To the extent that Mourelo's argument is based on the great weight of the evidence, the issue is not preserved because Mourelo did not raise it in a motion for a new trial pursuant to MCR 2.611(A)(1)(e).[33] We therefore review the issue for plain error affecting Mourelo's substantial rights.[34]

B. Eyewitness Testimony

In reviewing a claim that a verdict is against the great weight of the evidence, the appropriate test "is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand."[35] A court may not act as a "thirteenth juror" when deciding a motion for a new trial, and this Court "may not attempt to resolve credibility questions anew."[36] In *People v Lemmon*,[37] the Michigan Supreme Court recognized only narrow exceptions to the general principle against granting a new trial based on questions of witness credibility, for example, when witness testimony contradicts indisputable physical facts or laws, when it is patently incredible or defies physical realities, or when it is so inherently implausible that a reasonable juror could not believe it.[38] "If 'it cannot be said as a

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[30] *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000).

[31] Defendant also argues that fourth-degree CSC is not a sufficient predicate offense to support a first-degree home invasion conviction. Although this argument constitutes a challenge to the sufficiency of the evidence, we have already considered and rejected it in part IV, *supra*.

[32] *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998).

[33] *People v Noble*, 238 Mich App 647, 658; 608 NW2d 123 (1999).

[34] *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

[35] *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001).

[36] *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998).

[37] *Lemmon, supra* at 625.

[38] *Id.* at 643-644.

matter of law that the testimony thus impeached was deprived of all probative value or that the jury could not believe it,' the credibility of witnesses is for the jury."[39]

Mourelo characterizes the complainant's identification testimony as "uncertain," and points to omissions from her police statement, discrepancies in her description of him from his actual physical characteristics, conflicting evidence regarding the time of the assault, and the complainant's panicked state. However, these factors do not establish that the complainant's testimony was patently incredible or contrary to physical realities. The jurors had the opportunity to observe Mourelo and decide for themselves whether the complainant's description of her attacker reasonably fit his appearance. The jurors could have found that the complainant or other witnesses were simply mistaken about the specific time of these events. Mourelo also asserts that the absence of the complainant's DNA on his fingernails proves his innocence, because "a negative match is as exculpatory as a positive one is inculpatory," but he does not support this statement with citations to the law or the record. Mourelo emphasizes that the complainant's testimony was not corroborated by other evidence, but under MCL 750.526h, "[i]t is a well established rule that a jury may convict on the uncorroborated evidence of a CSC victim."[40] Mourelo has therefore failed to establish plain error affecting his substantial rights.

VI. Prosecutorial Misconduct

Mourelo claims that the prosecutor violated the ethics of his office by prosecuting him despite his knowledge of Mourelo's innocence. This argument reiterates Mourelo's claims of inconsistent evidence, the complainant's alleged incredibility, the lack of corroborative evidence, and Mourelo's undocumented theory that the complainant's boyfriend committed the crimes. We have already addressed these issues elsewhere in this opinion, and we reject Mourelo's claim that these matters prove his innocence.

VII. Judicial Bias

A. Standard Of Review

Mourelo did not preserve this issue with a timely objection or motion for disqualification.[41] Therefore, Mourelo must establish plain error that affected the outcome of the trial.[42]

B. Meeting The Standard

Mourelo argues that judicial bias denied him a fair trial, because the trial judge and his wife, United States Representative Candice Miller, have been involved in political efforts to increase funding for programs that assist sex crime victims, and because Representative Miller

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[39] *Id.* at 643, quoting *Anderson v Conterio*, 303 Mich 75, 79; 5 NW2d 572 (1942).

[40] *Id.* at 643 n 22.

[41] MCR 2.003(C); *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). Mourelo unsuccessfully moved for a remand for an evidentiary hearing to develop a factual record with regard to this issue.

[42] *Carines*, *supra* at 763-764.

serves on the board of directors for the Turning Point organization, which employed Diegel. Mourelo claims that these connections give the trial judge a material interest in successful prosecutions of defendants in CSC cases.

A judge is disqualified when he cannot impartially hear a case, including when he or his spouse has an economic interest in the subject matter in controversy or has any other more than de minimis interest that could be substantially affected by the proceeding.[43] The party claiming bias must overcome a heavy presumption of judicial impartiality, and a judge will not be disqualified absent actual personal bias or prejudice.[44] Here, Mourelo's claim of a tenuous connection between Diegel and the trial judge's wife, and his unremarkable claim that the trial judge and his wife have advocated for assistance to sexual assault victims, do not begin to overcome the presumption of impartiality. Mourelo has therefore failed to establish plain error affecting his substantial rights.

VIII. Cumulative Effect Of Several Errors

Finally, Mourelo claims that the cumulative effect of several errors denied him a fair trial. We recognize that the cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not.[45] However, Mourelo has not established any of his individual claims of error, so there could be no unfair cumulative effect.

Affirmed.

/s/ Hilda R. Gage
/s/ William C. Whitbeck
/s/ Henry William Saad

[43] MCR 2.003(B)(5).

[44] *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999).

[45] *People v Knapp*, 244 Mich App 361, 387-388; 624 NW2d 227 (2001).