STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK ANTHONY COLSTON,

Defendant-Appellant.

UNPUBLISHED
July 30, 1996

No. 163227
LC No. 91-110456-FH

Before: Neff, P.J. and Fitzgerald and C.A. Nelson,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of third-degree criminal sexual conduct, MCL 750.520d; MSA 28.788(4), and one count of fourth-degree criminal sexual conduct, MCL 750.520e; MSA 28.788(5). Defendant was subsequently convicted of being an habitual offender, second offense, MCL 769.10; MSA 28.1082. He appeals as of right. We affirm.

First, defendant argues that the trial court erred in allowing his accomplice, Sean Archer, to assert the Fifth Amendment privilege without conducting an inquiry into whether his invocation of the privilege was legitimate. We disagree. Defendant did not ask the court to question the witness regarding the legitimacy of the privilege outside the presence of the jury. Therefore, he cannot now complain of the trial court's procedure. See *People Lawton*, 196 Mich App 341, 345; 492 NW2d 810 (1992).

Next, defendant contends that the trial court abused its discretion in allowing Detective Raymond Ralls to testify regarding his conversation with Archer. For a nontestifying codefendant's statement to be introduced against a defendant, it must be admissible under the Michigan Rules of Evidence and it must not violate the defendant's constitutional right to confront his accuser, US Const, Am VI, and Const 1963, art 1, § 20. *People v Poole*, 444 Mich 151, 157; 506 NW2d 505 (1993). We find that the portion of the statement implicating Archer himself was admissible pursuant to MRE 804(b)(3) as a statement against penal interest. Although Archer had already pleaded guilty when he

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* Circuit judge, sitting on the Court of Appeals by assignment.

made the statement, he had not yet been sentenced. Cf. *People v Robertson*, 87 Mich App 109, 114; 273 NW2d 501 (1978). Moreover, because Archer had invoked the testimonial privilege, he was unavailable as a witness. MRE 804(a)(1); *People v Petros*, 198 Mich App 401, 414; 499 NW2d 784 (1993).

The "carry over" portion of a declarant's statement which implicates another accomplice falls within the penal interest exception when the circumstances under which the statement was made "vouch for its reliability." *People v Spinks*, 206 Mich App 488, 491; 522 NW2d 875 (1994). A statement "made in the context of a narrative of events, at the declarant's initiative without any prompting or inquiry" so it is "clearly against the declarant's penal interest" would likely be reliable. *People v Richardson*, 204 Mich App 71, 77; 514 NW2d 503 (1994). Reliability is also crucial to a determination regarding whether the statement violates the defendant's constitutional right to confront his accuser. For Confrontation Clause purposes, a hearsay statement of a nontestifying codefendant may be admitted as substantive evidence against a defendant if the prosecutor can establish that the declarant is unavailable as a witness and his statement bears adequate indicia of reliability or falls within a firmly rooted hearsay exception. *Poole*, *supra* at 163.

Based on the record, we find that Archer's statement was made under circumstances sufficiently reliable so as to satisfy the penal interest exception and the Confrontation Clause. Of crucial importance here is the fact that Archer had already pleaded guilty and admitted his involvement in the offense when he made the statement. Thus, it is unlikely that he was lying in order to shift the blame or gain favor with the authorities. Testimony at trial established that Archer was not promised leniency in exchange for the information. Archer did not attempt to minimize his role or responsibility in the assault or shift blame to defendant. Because Archer's attorney was present during the conversation, there would appear to be little question that the statement was made voluntarily. Under these circumstances, we find that the trial court did not abuse its discretion in admitting Archer's statement into evidence. Because Archer's statement was properly admitted into evidence, any error resulting from the introduction of Archer's guilty plea was harmless beyond a reasonable doubt.

Next, defendant contends that he is entitled to a new trial based on newly discovered evidence. We disagree. To justify a new trial on this basis, defendant must show that: (1) the evidence itself, not merely its materiality, is newly discovered;, (2) the newly discovered evidence is not merely cumulative; (3) including the new evidence on retrial would probably cause a different result; and (4) the moving party could not, using reasonable diligence, have discovered and produced the evidence at trial. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). The allegations contained within the affidavit of John Marchlewsi are based on out-of-court statements allegedly made by Archer and offered to prove the truth of the matter asserted. Thus, if this case were to be retried, Marchlewski's testimony would not be admissible against defendant. MRE 801. Similarly, defendant's reliance on the affidavit of James Gretch does not warrant a new trial. Newly discovered evidence is not grounds for a new trial if it would be used merely for impeachment. *People v Sharbnow*, 174 Mich App 94, 104; 435 NW2d 772 (1989).

At the hearing on the motion for a new trial, the trial court rejected defendant's contention that the prosecutor knew or had reason to know that Sean Archer would invoke his Fifth Amendment privilege in front of defendant's jury. Based on the affidavit of John O'Brien, we find that the court's decision did not constitute an abuse of discretion.

Next, defendant contends that he is entitled to a new trial because the prosecution suppressed an exculpatory witness statement. A defendant is entitled to have produced at trial all evidence bearing on guilty or innocence that is within the prosecutor's control. *Davis*, *supra* at 514. Where evidence is suppressed, the proper considerations for the reviewing court are whether (1) the suppression was deliberate, (2) the evidence was requested, and (3) the defense could have significantly used the evidence. *Id.* There is no support in the record for defendant's contention that defense counsel made a request for the statement prior to trial, nor is there any evidence establishing that the prosecutor deliberately withheld a copy of the statement from defendant. Moreover, because the statement did not serve to exculpate defendant, it is unlikely the defense could have made use of the evidence to a significant extent. Accordingly, reversal is not warranted on this basis.

Defendant argues that he was denied a fair trial by various instances of prosecutorial misconduct. We disagree. Defendant did not object to these issues below. Therefore, appellate review is precluded absent a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). After a careful review of the record, we find that no miscarriage of justice will result from our refusal to review these issues. Any prejudice resulting from the alleged misconduct could have been cured had defendant objected and requested a cautionary instruction. *People v Austin*, 209 Mich App 564, 570; 531 NW2d 811 (1995).

Next, defendant argues that he was denied a fair trial because the prosecution was allowed to call a rebuttal witness on a collateral matter. We disagree. The admission of rebuttal testimony rests within the sound discretion of the trial court, and we will not disturb the trial court's ruling absent a clear abuse of discretion. *People v Nantelle*, 215 Mich App 77, 85; 544 NW2d 667 (1996). The test for rebuttal evidence is whether it is justified by the evidence that it is offered to rebut. *People v Leo*, 188 Mich App 417, 422; 470 NW2d 423 (1991). Here, two defense witnesses implied that defendant was a homosexual. The fact that the rebuttal witness named her child after defendant tended to refute the implication created by these witnesses regarding defendant's sexuality. Accordingly, we find that the rebuttal testimony was proper. See e.g. *Nantelle*, *supra* at 86 (rebuttal testimony properly admitted where it served to contradict an implication created by the defense).

Defendant is not entitled to a new trial based on medical testimony indicating that the victim displayed the characteristics of a normal rape victim. The challenged testimony was a voluntary and unresponsive answer to the prosecutor's question. As a general rule, a voluntary and unresponsive statement by a prosecution witness does not constitute error unless the prosecutor knew in advance that the witness would give the unresponsive testimony or where the prosecutor conspired with or encouraged the witness to give that testimony. *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). Moreover, because a timely objection and curative instruction could have cured

any prejudice resulting from the admission of Dr. Clark's testimony into evidence, we find that manifest injustice has not been established. *People v Barker*, 161 Mich App 296, 306-307; 409 NW2d 813 (1987).

Defendant argues that his habitual offender conviction must be vacated because he was not given actual notice of the supplemental information before trial on the underlying offense. The record, however, does not support defendant's contention. A supplemental information charging defendant with being an habitual offender was introduced into evidence at trial. The information contained a time stamp indicating that the document was filed on August 26, 1991. Also introduced at evidence was a waiver of arraignment form signed by defendant and dated August 27, 1996. The waiver form indicates that defendant received a copy of the information and supplemental information and that he understood the substance of the charges against him. Based on these documents, we find that the trial court did not err in finding that defendant had actual notice of the habitual offender charge before to trial.

Next, defendant argues that he is entitled to be resentenced because the sentencing guidelines were improperly scored. We disagree. The trial court did not abuse its discretion in scoring Offense Variable 9. A sentencing judge has discretion in determining the number of points to be scored as long as evidence exists adequate to support the score. *People v Derbeck*, 202 Mich App 443; 509 NW2d 534 (1993). In determining whether a defendant is a leader, the entire criminal episode or situation must be taken into consideration. Michigan Sentencing Guidelines Manual, p 45. In the instant case, it was defendant who arranged to meet with the victim. Upon arriving at the motel, defendant told Archer to go get the key. Shortly thereafter, Archer left the motel and did not return until later that evening. While Archer was gone, defendant sexually molested the victim. When Archer returned to the motel, he consulted with defendant before initiating sexual contact with the victim. Later, defendant sexually assaulted the victim a second time. Based on these facts, we find that sufficient evidence existed to support the score of ten points for OV 9.

We also reject defendant's contention that the trial court relied upon impermissible factors in sentencing defendant to twelve to twenty-two and a half years in prison. Although the prosecutor asked the court to consider the fact that defendant refused to admit his complicity in the sexual assault and exercised his right to trial on the habitual offender charge, the record indicates that the sentence imposed on defendant was based entirely on the circumstances of the offense and the prior history of the offender.

Finally, defendant contends that his sentence is disproportionate. This issue is not preserved for appeal because it was not set forth in defendant's statement of the questions presented. *People v Yarbrough*, 183 Mich App 163, 165; 454 NW2d 419 (1990). Moreover, defendant makes no meaningful argument with regard to this issue in his brief on appeal.

Affirmed.

/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald
/s/ Charles A. Nelson