In the Missouri Court of Appeals
Eastern District

DIVISION FIVE

STATE OF MISSOURI,	)	ED97047
	)	
Respondent,	)	Appeal from the Circuit Court
	)	of the City of St. Louis
v.	)	
	)	Honorable John C. Riley
JERRY OUSLEY,	)	0922-CR05977-01
	)	
Appellant.	)	Filed: November 20, 2012

Introduction

Jerry Ousley (Defendant) was convicted by jury of forcible rape under Section 566.030, RSMo. (Cum. Supp. 1998), and sentenced to fifteen years in the Missouri Department of Corrections. He appeals and requests a new trial. We affirm.

Background

Viewed in the light most favorable to the verdict,[1] the evidence at trial showed the following. On December 26, 1999, 14-year-old L.M. (Victim) went to Union Station to go shopping with one of her friends named Barbara, and to meet a boy named Shawn. This was the first time Victim had gone out by herself, and she did not tell her mother she was going to meet a boy. Her mother had told her to be home before dark, but she called her mother as it was getting dark, around 7 p.m., to tell her that she was okay and was

[1] State v. Taylor, 134 S.W.3d 21, 24 (Mo. banc 2004).

coming home. Victim planned to walk home because she did not live far from Union Station.

As Victim was walking down 18th Street toward the street on which she lived, a car came up behind her. There were two men inside, and they were talking to her and asking her for her phone number. Victim ignored them and kept walking. At some point, Defendant exited the car, caught up to Victim, and grabbed her. He put his arms around her and pulled her into an alley, pulling on her clothes. Victim kept asking him to stop and let her go. There was a car parked in the alley, and Defendant pushed Victim up against the front of the car and held her there with her back to him. He unfastened her pants and pulled down her pants and underwear, and then he forced his penis into her vagina. Victim had never had sexual intercourse before this rape. Victim kept asking him to stop, and eventually she hit him or elbowed him and he staggered away. She ran all the way back to her house.

When Victim got home, she went straight to the bathroom and told her mother she did not want to come out. Her mother kept asking her what was wrong, and eventually Victim came out and showed her mother the underwear she had been wearing, which was bloody. Victim's mother called the police and took Victim to the hospital, where doctors performed a vaginal exam and took a vaginal swab. The police interviewed Victim, and forensic investigators performed DNA tests on her clothing and vaginal swab. They found only Victim's DNA on the vaginal swab,[2] but seminal fluid was present both on Victim's pants and underwear.

[2] The forensic expert who testified stated that it is not uncommon for a victim's DNA to overwhelm any male DNA, especially if there is not much seminal fluid present.

Photographs taken of the car that was in the alley that day showed fingerprints on the front of the car. The car was also covered in dust, but dust was missing on the front part of the car, where Victim said her attacker held her against the car. Victim did not know the man who raped her, and police were not able to identify him during their initial investigation.

In 2009, for an unrelated reason, Defendant's DNA information was put into a police DNA database, which matched his DNA to that collected from Victim's clothing in 1999. Detectives reopened the investigation and interviewed Victim. They showed her an array of photographs, and though she was not sure she could remember what the person who raped her looked like, she chose Defendant's photo as the person who looked the most familiar to her. The police subsequently arrested Defendant for the rape of Victim. After a jury trial, Defendant was convicted of forcible rape and sentenced to fifteen years in prison. This appeal follows. Additional facts related to each point on appeal are set forth below.

Discussion

Defendant raises three points on appeal. First, he argues the trial court abused its discretion by excluding two of his witnesses as a sanction for untimely disclosure (endorsement), and in the alternative, he argues the trial court abused its discretion by excluding the witnesses as surrebuttal evidence. Second, Defendant argues the trial court abused its discretion by not allowing his counsel to ask during voir dire whether the venire panel would consider the possibility that two teenagers had consensual sexual intercourse. Finally, Defendant argues the trial court committed plain error in instructing the jury by failing to use an applicable Missouri Approved Instruction (MAI).

Point I

Defendant requests a new trial due to the trial court's exclusion of testimony from his mother and grandmother as a discovery sanction for late disclosure. Additionally, Defendant assigns error to the trial court's failure to allow this testimony as surrebuttal.

Defendant's trial began on Monday, April 25, 2011. The trial court had entered a scheduling order requiring disclosure of all material information by Monday, April 18, 2011. On April 22, the Friday before trial, Defendant's attorney filed a motion to endorse two witnesses, Defendant's mother and grandmother. At that time, Defendant's attorney also gave the State records of medical treatment Defendant received on December 2, 1999, for a gunshot wound in his buttock and back. Defendant's mother and grandmother would have testified that due to Defendant's injury, he was not able to walk very well for several weeks, including December 26, 1999, the day Victim was raped. The State moved to exclude all of this evidence as a sanction for untimely disclosure. The trial court sustained the motion as it related to Defendant's witnesses, but the court did allow Defendant to offer the medical records as evidence.

At trial, Defendant testified about his gunshot wound and its effect on his physical capabilities on December 26, 1999. He testified that he was shot in the back during the first week of December 1999. He said he was told to stay in bed, and he was afraid to walk because the doctor said the bullet might move in his back. He was afraid of becoming paralyzed. He testified that he "laid around just for a couple of months," and after that he used "crutches for a couple weeks" and then "limped around for probably another three weeks." Defendant testified that he was capable of having sexual intercourse during that time, but only in certain positions, and standing up behind

someone was not one of them. He said he was limping around, but he "wasn't in a lot of pain." He testified that he would not have gone to malls during that time, and that he had never had sex with anyone in the alley where Victim was raped. Rather, he said during the time he was injured, girls that he had met before visited him at his grandmother's home, where he was living at the time. He said if he had sex with anyone during the time he was injured, it most likely happened at his grandmother's home. He testified that he does not remember Victim, but during that time in his life, he had sex with many different girls. He and his friends had a "game" to try to get girls' phone numbers and see who could have sex with them. In any event, he said that he had never forced anyone to have sex with him.

After the defense rested, on Wednesday, April 27, the State called a rebuttal witness, Dr. Rebecca Aft. Dr. Aft had treated Defendant for his gunshot wound in 1999. She read from the medical records that Defendant was shot in the right buttock, and the bullet traveled toward his left back. He sustained a fracture in his hip bone, but that type of fracture was not something that would need treatment. Defendant was released the following morning, and he was neither told he needed crutches nor to stay in bed, but rather his instructions were to "ambulate and resume all his normal daily activities," except for running or contact sports. She testified that the bullet was far from Defendant's spinal canal, so there was no danger of it lodging in his spine or paralyzing him. There were no records of any follow-up appointment, but Dr. Aft testified that by December 26, 1999, most patients with Defendant's injury would have fully recovered from their pain.

After this testimony, Defendant again attempted to offer testimony from his mother and grandmother, this time as surrebuttal. The State objected, arguing Defendant was improperly attempting to avoid the court's previous sanction. The trial court sustained the objection.

Standard of Review

Discovery sanctions are imposed at the discretion of the trial court. State v. Moore, 366 S.W.3d 647, 653 (Mo. App. E.D. 2012). Exclusion of evidence is a drastic sanction that should be applied sparingly by the trial court, and reversal is warranted where such exclusion "resulted in fundamental unfairness to the defendant." Id. (citing State v. Hopper, 315 S.W.3d 361, 367 (Mo. App. S.D. 2010)).

The scope of surrebuttal is also within the sound discretion of the trial court, and we reverse only where the trial court abused its discretion and the defendant suffered prejudice thereby. See State v. May, 587 S.W.2d 331, 336-37 (Mo. App. E.D. 1979); see also State v. Sawyer, 365 S.W.2d 487, 491 (Mo. 1963) (rebuttal testimony).

Analysis

First, Defendant argues the trial court abused its discretion by excluding the testimony of his mother and grandmother as a sanction for late disclosure. Defendant argues that the trial court's sanction caused fundamental unfairness and thus was improper. We disagree.

In considering whether Defendant suffered fundamental unfairness by the exclusion of these witnesses, we first examine the harm to the State as a result of the late endorsement. State v. Moore, 366 S.W.3d 647, 653 (Mo. App. E.D. 2012). Such harm can come "in the form of unfair surprise." Id. Here, the State argued Defendant's late

endorsement left insufficient time to adequately prepare for his defense that he was physically unable to commit the rape, and that he did not go out of the house during the weeks after he was injured.

Furthermore, "[e]xclusion of a witness may be proper when no reasonable justification is given for the failure to disclose the witness." Id. On the morning of trial, in opposing the State's motion to exclude Defendant's mother and grandmother as witnesses, defense counsel told the trial court that he had found the witnesses only the week before trial, and he had initially planned not to call them to testify. He said, however, he made that decision before he obtained the medical records, which corroborated what the witnesses had said. The prosecutor told the trial court that she had spoken to the witnesses that morning, and they indicated they had visited Defendant several times in jail leading up to trial. Given these facts, the trial court had discretion to find the State had been unfairly surprised, with no reasonable justification given by Defendant for such a surprise. See e.g., State v. Watson, 755 S.W.2d 644, 646 (Mo. App. E.D. 1988) (no reasonable justification for failing to disclose witnesses who were relatives).

Next, we examine "the prejudice to the defendant as a result of the exclusion of the testimony, considering the nature of the charge, the evidence presented, and the role of the excluded evidence in the defense's theory." Moore, 366 S.W.3d at 653. Defendant testified about his wound, and the trial court allowed him to present the medical records as evidence to corroborate his testimony. Defendant argues that the trial court's exclusion of his witnesses forced him to testify and prejudiced him because his testimony as the defendant was less credible. Initially, the notion that the jury would find

Defendant's mother and grandmother to be more credible witnesses than Defendant himself is speculative. After a review of the record, we see no evidence that Defendant was forced to testify or that the jury was more likely to believe Defendant's mother and grandmother in light of all the evidence presented. Defendant has not shown an abuse of discretion on the part of the trial court or that he suffered fundamental unfairness from the court's sanction of his late disclosure.[3] See Moore, 366 S.W.3d at 653.

Alternatively, Defendant argues that he should have been allowed to call his mother and grandmother as surrebuttal witnesses because the rules of discovery do not apply to surrebuttal. We agree, but we conclude this error was insufficiently prejudicial to warrant reversal.

If the State introduces a new matter during rebuttal of the defendant's evidence, the defendant is entitled to offer surrebuttal. State v. Huff, 454 S.W.2d 920, 923 (Mo. 1970). Generally, because the nature of rebuttal requires a party to depend on the evidence presented in determining whether or not to offer rebuttal, rebuttal witnesses need not be disclosed or endorsed.[4] State v. Cameron, 604 S.W.2d 653, 657(Mo. App. E.D. 1980). The trial court determines whether rebuttal is proper without regard to the rules of disclosure. Id. Similarly, a defendant is not required to disclose surrebuttal evidence. Accord State v. Williams, 119 S.W.3d 674, 677 (Mo. App. S.D. 2003) (defendant not required to disclose rebuttal evidence obtained only after defense rested).

[3] While the better practice of the trial court is to grant a continuance to avoid any finding of fundamental unfairness to a defendant; for defendants who are fully aware of the presence of possible witnesses, it may be better to endorse them and not call them as witnesses than to fail to endorse them and risk exclusion as a sanction for late endorsement.

[4] However, the State must disclose evidence used to rebut a defense of alibi or mental disease or defect, as these are defenses of which the defendant must notify the State if he or she intends to rely on them. State v. Campbell, 356 S.W.3d 774, 779 (Mo. App. E.D. 2011). Neither party argues this rule applied here.

Its nature as a tool to rebut is such that requiring disclosure would be inconsistent with the rule for rebuttal.

The fact that the trial court imposed a sanction excluding Defendant from calling his mother and grandmother in his case-in-chief does not affect our conclusion. The State chose to call Dr. Aft to rebut Defendant's testimony about his physical condition on the day of the rape. Regardless of any initial discovery sanction, when Defendant offered his mother and grandmother as surrebuttal witnesses, it became a new inquiry for the trial court as to whether Defendant was entitled to call the witness during surrebuttal in light of the State's rebuttal evidence. See Huff, 454 S.W.2d at 923. This determination was to be made anew without reference to the rules of discovery or the trial court's earlier sanction. See Cameron, 604 S.W.2d at 657. It was error for the trial court to sanction Defendant for late disclosure in a surrebuttal context where no rule requiring disclosure or endorsement applied.[5]

However, in order to reverse, we must also find Defendant was so prejudiced by the exclusion of his surrebuttal evidence that there is a reasonable probability it affected the outcome of the trial. See State v. Forrest, 183 S.W.3d 218, 223-24 (Mo. banc 2006). Essentially, we must find that had the jury heard and believed the testimony of Defendant's mother and grandmother, there is a reasonable probability Defendant would have been acquitted. See State v. Hopper, 315 S.W.3d 361, 370 (Mo. App. S.D. 2010). Defendant cannot make such a showing.

[5] Even accepting the State's argument that allowing Defendant's witnesses would have allowed him an end run around the trial court's sanction, the State's use of Dr. Aft as a rebuttal witness three days into the trial mitigated the prejudice suffered by the State from the late disclosure of Defendant's medical records and witnesses.

His defense at trial was that he could not have physically committed the rape that Victim experienced due to his injury, and his testimony was that he had never had sexual intercourse in that alley but rather sexual intercourse he had at that time would most likely have occurred at his grandmother's house. Rather than confirming that Victim did in fact visit Defendant at his grandmother's house, these witnesses would have simply confirmed Defendant's own testimony that on December 26, 1999, Defendant was unable to walk very well due to his gunshot wound. However, the DNA evidence of Defendant's seminal fluid on Victim's clothing, Victim's testimony that the rape occurred outside in the alley in the wintertime, along with the evidence of prints and dirt missing on the car against which Victim testified she was held, leave no reasonable probability that the testimony by Defendant's mother and grandmother would have changed the jury's verdict. See State v. Anderson, 348 S.W.3d 840, 847 (Mo. App. W.D. 2011) (finding defendant not prejudiced by trial court's exclusion of rebuttal testimony of defendant's daughter, previously excluded as discovery sanction, because testimony was cumulative and not focused on material issue). Point denied.

Point II

Defendant argues the trial court erred in prohibiting his counsel from asking the venire panel during voir dire whether they could consider the possibility that two teenagers had consensual sexual intercourse. He argues this denied him his right to a fair trial. We agree defense counsel's proffered question was permissible, but the trial court's limitation of voir dire did not result in prejudice to Defendant.

Standard of Review

We review the trial court's decisions regarding voir dire examination for abuse of discretion. "The [trial court] is in the best position to determine whether a disclosure of facts on voir dire sufficiently assures the defendant of an impartial jury without at the same time amounting to a prejudicial presentation of the evidence." State v. Baumruk, 280 S.W.3d 600, 614 (Mo. banc 2009). We reverse where a defendant demonstrates a "real probability" that he was prejudiced by the trial court's limitation of voir dire. Id.

Analysis

During voir dire, the trial court should afford counsel liberal latitude in examining potential jurors, in order to root out bias or prejudice among the venire panel and ensure the defendant an impartial jury. State v. Clark, 981 S.W.2d 143, 146 (Mo. banc 1998). "[I]t is improper to prohibit a party from inquiring about 'critical facts' during voir dire, that is, facts with a 'substantial potential for disqualifying basis.'" State v. Edwards, 116 S.W.3d 511, 529 (Mo. banc 2003) (quoting Clark, 981 S.W.2d at 147). However, counsel must refrain from trying the case on voir dire or seeking a commitment from the jury that they will react to anticipated evidence in a certain way. Clark, 981 S.W.2d at 146-47. Any questions that do so are properly excluded. "The test is [the question's] relationship to a critical fact of the case and whether [it is] phrased in such a way as to uncover rather than to inject bias or prejudice." State v. Ezell, 233 S.W.3d 251, 253 (Mo. App. W.D. 2007).

Here, at the time of the rape, Victim was 14 years old, and Defendant was 19. Defendant was charged with forcible rape and not statutory rape. The question defense

counsel wanted to ask the venire panel was "[w]hether they can consider the possibility or do they automatically rule out the possibility of two teenagers that had consensual sex." The State objected that the question was improper because it was essentially the theory of the defense. The court sustained the objection. Defense counsel responded, "But I should be able to say . . . if you hear evidence . . . that two teenagers close in age had sexual intercourse and believe that, . . . does that mean automatically you're going to find somebody guilty of forcible rape."

Defendant argues this question sought to reveal critical facts and expose potential jurors' biases regarding teenagers consenting to sexual intercourse. Given the context, we agree. Defendant could not have been charged with statutory rape.[6] No law prohibited a 19-year-old and a 14-year-old from engaging in consensual sexual intercourse with one another. Defense counsel's question sought to uncover whether any of the potential jurors would nevertheless impose legal consequence to such an act. We do not conclude, as the trial court did, that this would have required a commitment from jurors to acquit Defendant upon hearing that two teenagers had sexual intercourse, but rather the question sought to ensure the jurors could follow the law as it relates to sexual intercourse among minors, if they believed from the evidence the intercourse here was in fact consensual. See State v. Chaney, 967 S.W.2d 47, 57 (Mo. banc 1998) (relevant inquiry is whether prospective juror can follow law); State v. Clement, 2 S.W.3d 156, 158-59 (Mo. App. W.D. 1999) (defendant entitled to ask questions beyond general fairness and "follow-the-law" questions to root out particular bias).

[6] Statutory rape is defined as a person having sexual intercourse with another person who is less than fourteen years old, or a person who is at least twenty-one years of age having sexual intercourse with a person who is less than seventeen years old. Sections 566.032 (first degree), 566.034 (second degree), RSMo. (Cum. Supp. 2011). These definitions were the same in 1999. Sections 566.032, 566.034, RSMo. (1994).

However, viewing the voir dire in its entirety, we find no reasonable probability this error resulted in prejudice to Defendant. Defendant argues he was prejudiced in that he was unable to ferret out jurors who would not consider his consent defense. While the trial court did not allow his proffered question, the court did permit Defendant's counsel to ask whether the venire members would be able to carefully and impartially consider the testimony of a witness who claims she was raped in light of all the evidence. Defense counsel was also permitted to explain that inconsistencies in a witness's testimony can go into the jury's calculus as to the weight to give that testimony. Additionally, in response to one venireperson's question about the age of Defendant and indication that this might affect her decision if Victim was promiscuous, the State asked "If you were to learn that they were close in age, okay, are you going to automatically say no way could there have been forcible rape . . . ?" In this context, the record does not support Defendant's argument that he was unable to uncover potential bias on the part of the venire panel. See State v. Hunter, 179 S.W.3d 317, 322 (Mo. App. E.D. 2005) (holding record did not support Defendant's prejudice assertion where during voir dire both State and defendant asked questions related to excluded question); State v. Johnson, 62 S.W.3d 61, 65 (Mo. App. W.D. 2001) (no prejudice where defendant permitted to ask similar questions). Point denied.

Point III

Defendant argues the trial court plainly erred in giving the verdict director for forcible rape, Instruction 6, because the instruction did not conform to the applicable Missouri Approved Instruction (MAI). At trial, the parties agreed that the applicable MAI verdict director was that found in MAI-CR 2d. On appeal, the parties agree the

applicable instruction should have come from MAI-CR 3d. Both instructions contained the same first two elements; namely, that Defendant had sexual intercourse with Victim and did so by the use of forcible compulsion. However, MAI-CR 3d 320.02 adds a third element: "that the defendant did so knowingly." Defendant argues the failure to include this element in Instruction 6 excused the State from proving a required element beyond a reasonable doubt, and manifest injustice occurred thereby. We disagree.

Standard of Review

Defendant concedes this error was not preserved and requests plain error review under Rule 30.20.[7] While failure to conform an instruction to an applicable MAI is presumed prejudicial, plain error review requires a defendant to show more than prejudice. State v. Roe, 6 S.W.3d 411, 415 (Mo. App. E.D. 1999). "[A] defendant must prove that the error resulted in manifest injustice or a miscarriage of justice." Id. Instructional error causes such injustice when it is apparent that the error affected the jury's verdict, in that it "excused the State from its burden of proof on [a] contested element of the crime." State v. Doolittle, 896 S.W.2d 27, 29-30 (Mo. banc 1995).

Analysis

Section 566.030.1 states, "A person commits the crime of forcible rape if such person has sexual intercourse with another person by the use of forcible compulsion."[8] Defendant argues a knowing mental state is required by virtue of Section 562.021.3, RSMo. (2000) (enacted in 1997), which imputes a knowing mental state into the

[7] All rule references are to Mo. R. Crim. P. (2012), unless otherwise indicated.
[8] This language from the current version of the statute is the same as it was when the rape was committed. Compare Section 566.030.1, RSMo. (Cum. Supp. 1998) with Section 566.030.1, RSMo. (Cum. Supp. 2011).

definition of any offense which otherwise omits a culpable mental state, "[e]xcept as provided in . . . section 562.026."

The State argues that exception applies here:

> A culpable mental state is not required:
> . . .
> (2) If the offense is a felony . . . and no culpable mental state is prescribed by the statute defining the offense, and imputation of a culpable mental state to the offense is clearly inconsistent with the purpose of the statute defining the offense or may lead to an absurd or unjust result.

Section 526.026, RSMo. (2000) (enacted in 1997). Directly on point is the Western District's decision in State v. Dennis, 153 S.W.3d 910 (Mo. App. W.D. 2005). Citing the Missouri Supreme Court, the court in Dennis states that "the exception noted in [S]ection 562.021, i.e., [S]ection 562.026, is applicable to the offense of rape," because "the crime of rape [is] a crime of strict liability." Id. at 920 (citing State v. Beishir, 646 S.W.2d 74, 77 (Mo. banc 1983)).[9] Missouri has long held that with respect to rape, intent is implied by the act itself. State v. Tompkins, 277 S.W.2d 587, 591 (Mo. 1955); see also State v. Harris, 620 S.W.2d 349, 355 (Mo. banc 1981) ("In rape, purpose and motive are irrelevant.").

While MAI-CR 3d 320.02 includes a mental state element, this instruction is not binding to the extent that requiring such an element conflicts with substantive law. See State v. Carson, 941 S.W.2d 518, 520 (Mo. banc 1997). Therefore, the fact that the trial court omitted the mental state element from Instruction 6 did not prejudice Defendant, much less cause manifest injustice. Point denied.

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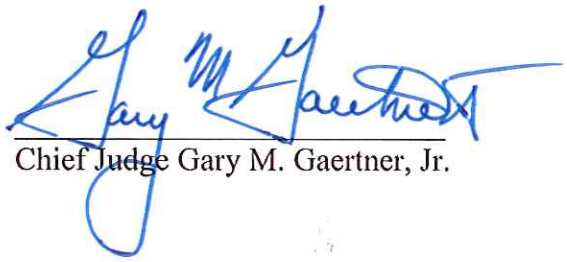
[9] Because Defendant argues that State v. Bryant, 756 S.W.2d 594 (Mo. App. W.D. 1988), establishes the need for a mental state element, we note the Dennis court's statement that "[t]o the extent that this court's decision[] in State v. Bryant . . ., find[s] that the crime of rape under [S]ection 566.030 requires that the culpable mental state be as set forth in [S]ection 562.021, [it] should no longer be followed." Dennis, 153 S.W.3d at 920 n.4.

Conclusion

The trial court's error in excluding Defendant's surrebuttal witnesses was insufficiently prejudicial to warrant reversal, and Defendant has not shown he was prejudiced by the trial court's limitation of Defendant's voir dire. The trial court's verdict director conformed to the substantive law, and thus its failure to include MAI-CR 3d's mental state element did not result in manifest injustice. We affirm.



Chief Judge Gary M. Gaertner, Jr.

Lawrence E. Mooney, J. concurs.
Robert M. Clayton III, J. concurs.