STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLARD BLANKENSHIP,

Defendant-Appellant.

UNPUBLISHED
May 24, 1996

No. 177967
LC No. 93-012175

Before: Doctoroff, C.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of breaking and entering an occupied dwelling, MCL 750.110; MSA 28.305, and second-degree criminal sexual conduct, MCL 750.520c(1)(c); MSA 28.788(3)(1)(c). Subsequently, defendant pleaded guilty to being a second-felony offender, MCL 769.10; MSA 28.1082. Defendant was sentenced to four to fifteen years' imprisonment for the breaking and entering conviction, five to fifteen years' imprisonment for the second-degree criminal sexual conduct conviction, and five to twenty-two years and six months' imprisonment as a second-felony offender. He now appeals as of right. We affirm defendant's convictions. We affirm defendant's habitual sentence, but vacate defendant's sentence on the underlying felony conviction of second-degree criminal sexual conduct.

Defendant first argues that the trial court erred in instructing the jury on an essential element of the crime of breaking and entering an occuppied dwelling with the intent to commit criminal sexual conduct in the second degree. Defendant contends that the charge as given merely indicated that the prosecutor had to show an intent to commit some criminal sexual conduct, not the specific felony. We disagree.

Because defendant failed to object to the jury instructions or the verdict form below, appellate review is precluded absent manifest injustice. *People v Ferguson*, 208 Mich App 508, 510; 528 NW2d 825 (1995). In reviewing the jury instructions in their entirety, we find that the court instructed

the jury that, in order to find defendant guilty of this crime, the prosecutor had to prove that defendant had the specific intent to commit the act, including the felony, and then proceeded to instruct on the element of the felony. *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994). Therefore, we find no manifest injustice. *Ferguson, supra*, p 510.

Defendant next argues that he was denied his right to a fair trial and to confrontation when the trial court precluded him from presenting evidence that the complainant had specific episodes of disassociation with reality. We disagree.

The record indicates that the court denied defendant's request to admit this evidence because defendant could not lay a proper foundation to establish relevancy. Specifically, defendant could not establish that the complainant was experiencing a disassociation with reality at the time of the incident similar to that which defendant sought to introduce. Therefore, defendant could not establish that the evidence was relevant because he could not establish that it would make the existence of a fact of consequence to the determination of the action more or less probable. MRE 401; *People v VanderVliet*, 444 Mich 52, 60; 508 NW2d 114 (1993). Accordingly, we conclude that the trial court did not abuse its discretion in refusing to admit irrelevant evidence. MRE 402; *People v Underwood*, 184 Mich App 784, 786; 459 NW2d 106 (1990). We also conclude that defendant was not denied his right to confrontation because this right does not include a right to cross-examine on irrelevant issues. *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993).

Next, defendant argues that his Fifth Amendment right against self-incrimination was violated when the trial court ruled that statements made by defendant to the police were admissible even though defendant had not been read his *Miranda*[1] rights. We disagree.

The record indicates that the court allowed the prosecutor to introduce statements made by defendant in response to questioning from one of the officers who responded to the scene. The record further indicates that defendant was not handcuffed at the time, that the questioning occurred in defendant's own home, and that he was allowed to remain at home after the questioning occurred. It is axiomatic that *Miranda* warnings need only be given in cases involving custodial interrogation. *People v Anderson*, 209 Mich App 527, 532; 531 NW2d 780 (1995). Although we find that the officer was interrogating defendant at the time of questioning, we do not find that defendant was in custody at the time. *Id.* Accordingly, we conclude that defendant's rights were not violated and, therefore, the trial court's finding that defendant's statements were admissible was not clearly erroneous. *People v Jobson*, 205 Mich App 708, 710; 518 NW2d 526 (1994).

Defendant next argues that he was denied his right to a fair trial when the prosecutor improperly argued that the "undisputed" and "uncontradicted" evidence established defendant's guilt and that the jury should not let him "get away" with it. We disagree.

Defendant properly preserved only one of the two alleged instances of misconduct with a timely objection. *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992). Specifically,

defendant properly preserved his claim that the prosecutor improperly implored the jury not to let defendant "get away" with the crime. However, defendant failed to object to the prosecutor's comment that the evidence was "undisputed" and "uncontradicted." Therefore, the latter instance of misconduct will be reviewed only for manifest injustice. *People v Gonzalez*, 178 Mich App 526, 534-535; 444 NW2d 228 (1989).

Because the prosecutor's comment to the jury, that if they did not hold defendant responsible he would "get away" with the crime, was based on evidence produced at trial, defendant was not prejudiced. See *People v Bahoda*, 448 Mich 261, 263; 531 NW2d 659 (1995). Further, because this Court has previously found that a prosecutor may properly comment that the evidence was "uncontradicted" or "undisputed," no manifest injustice occurred by the prosecutor's identical comments here. *People v Guenther*, 188 Mich App 174, 176-178; 469 NW2d 59 (1991). Accordingly, we conclude that defendant was not denied his right to a fair trial by the prosecutor's comments. *Wofford*, *supra*, p 282.

Next, defendant argues that the trial court abused its discretion in sentencing him as a second-felony offender because the court erroneously believed that it had to impose a mandatory minimum five-year sentence, failed to respond to defendant's challenge to out-of-state convictions, and failed to vacate the underlying conviction once the felony offender sentence was entered. While we disagree with defendant that the trial court abused its discretion in sentencing him as a second-felony offender, we agree that the trial court erred in failing to vacate his underlying sentence for second-degree criminal sexual conduct.

Pursuant to MCL 750.520f; MSA 28.788(6), a mandatory five-year minimum sentence is required if a person is convicted of a second or subsequent offense under §520c. Therefore, where defendant's presentence investigation report indicates that he was previously convicted of first and second-degree criminal sexual conduct, MCL 750.520f; MSA 28.788(6) was applicable, and the trial court did not abuse its discretion in stating that it was bound to impose a five-year minimum sentence. *People v Odendahl*, 200 Mich App 539, 540-541; 505 NW2d 16 (1993). In addition, we find defendant's argument that the trial court improperly considered his out-of-state convictions at sentencing to be disingenuous where the record indicates that defense counsel admitted that the out-of-state convictions were not considered on the felony information. However, we agree that, pursuant to MCL 769.13; MSA 28.1085, defendant's underlying sentence for second-degree criminal sexual conduct should have been vacated in light of his sentence as a second-felony offender.

Accordingly, we affirm defendant's convictions and sentence as a second felony offender, but vacate defendant's sentence for second-degree criminal sexual conduct.

/s/ Martin M. Doctoroff
/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald

[1]*Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).