

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM FREDERICK KARY,

Defendant-Appellant.

UNPUBLISHED

September 27, 1996

No. 176707

LC No. 94-130703

Before: MacKenzie, P.J., and Saad and Youngblood,* JJ

PER CURIAM.

Following a bench trial, the court convicted defendant of first-degree criminal sexual conduct (CSC-1), MCL 750.520b(1)(f); MSA 28.788(2)(1)(f), resisting arrest, MCL 750.479; MSA 28.747, and malicious destruction of police property, MCL 750.337b; MSA 28.609(2). The court sentenced defendant to prison terms of ten to twenty years for CSC-1, one to four years for malicious destruction of police property, and one to two years for resisting arrest. Defendant appeals and we affirm.

Defendant sexually assaulted his wife and thereafter resisted arrest. The victim testified that she and defendant had been drinking and arguing, and that he physically attacked her. Defendant hit her head against the floor repeatedly and she blacked out. While she was unconscious, defendant removed her pants and underwear and rectally penetrated her. When arrested, defendant struggled with the sheriff's deputies and repeatedly kicked at and damaged the windows and door of the patrol car.

Defendant raises six issues on appeal, none of which require reversal of his convictions or sentences.

I.

Defendant argues that the trial judge denied him due process of law and equal protection of law by threatening the victim with prosecution for perjury. We disagree.

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

Following the preliminary examination, the victim wrote several letters stating that no sexual assault occurred. These letters contradicted her preliminary examination testimony. At trial, the judge informed her that she could be prosecuted for perjury if she testified untruthfully, and informed her that she could consult with an attorney before testifying. The victim responded that she did not wish to consult with a lawyer and proceeded to testify at trial. The trial judge acted properly, and did not violate defendant's constitutional rights. *People v Jackson*, 114 Mich App 649, 662; 319 NW2d 613 (1982), *rev'd on other grounds* 421 Mich 39; 365 NW2d 56 (1984).

II.

Defendant asserts that the prosecutor improperly questioned him regarding a 1991 attack upon the victim. We disagree. Defendant also contends that the prosecutor engaged in misconduct by raising the same prior bad act during his rebuttal argument. We find no misconduct.

Defendant did not raise a timely objection to this line of questioning at trial, and so has not preserved this issue for review. MRE 103(a)(1). Moreover, the prosecutor properly pursued this line of questioning to impeach defendant's credibility and show his intent. MRE 404(b)(1); *People v VanderVliet*, 444 Mich 52 78; 508 NW2d 114 (1993). The prosecutor properly commented on this testimony during rebuttal. *People v Gilbert*, 183 Mich App 741, 745-746; 455 NW2d 731 (1990).

III.

Defendant claims that his sentence is disproportionately severe. We disagree. The trial judge did not abuse his discretion when sentencing defendant. Defendant's sentence falls within the range recommended by the guidelines and does not violate the principle of proportionality. *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992); *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

IV.

Defendant contends that the trial judge erred by failing to consider second-degree criminal sexual conduct (CSC-2) as a lesser included offense. We disagree. Defendant did not ask the trial court to consider the lesser charge of CSC-2. Nor would the evidence presented have supported a conviction for that crime. Both the victim and defendant testified that sexual penetration occurred; the only relevant issue was whether that penetration was consensual. Any failure to consider a lesser charge of CSC-2 was proper. *People v Wilhelm (On Reh)*, 190 Mich App 574, 577; 476 NW2d 753 (1991).

V.

Defendant alleges that his trial counsel's failure to ask the trial judge to consider the lesser charge of CSC-2 and failure to object to the trial judge's statements to the victim regarding perjury denied him effective assistance of trial counsel. We disagree.

As previously noted, the trial court properly informed the victim that she could be prosecuted for perjury if she lied on the witness stand. Since the evidence would not support a conviction for CSC-2, it was not necessary for defense counsel to ask the court to consider that charge. Defendant has not shown that his trial counsel's performance fell below the standard required or somehow caused prejudice to his case. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

VI.

Finally, defendant says that his conviction was against the great weight of the evidence. We disagree.

The victim testified that defendant beat her unconscious, and that she felt him penetrating her rectum as she regained consciousness. The victim's testimony regarding anal penetration was not equivocal. The clear weight of the evidence supported the verdict. *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993).

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Henry William Saad
/s/ Carole F. Youngblood