STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FREDERICK ORLANDO JONES, JR.,

Defendant-Appellant.

UNPUBLISHED
October 1, 1996

No. 174915
LC No. 93-008271

Before: Reilly, P.J., and Sawyer and W.E. Collette,* JJ.

PER CURIAM.

Defendant appeals by right his conviction following a jury trial of first-degree criminal sexual conduct, MCL 750.520b(1)(e); MSA 28.788(2)(1)(e), two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(b); MSA 28.7884(1)(b), and unarmed robbery, MCL 750.530; MSA 28.798. Defendant pleaded guilty following the trial to being a second habitual felony offender, MCL 769.10; MSA 28.1082. Defendant was sentenced to twenty-five to forty years' imprisonment for the CSC-1 conviction, seven and one-half to fifteen years for each CSC-3 conviction and ten to twenty-five years for the robbery conviction. These sentences are to be served concurrently and defendant was not given any credit for time served. We affirm in part, reverse in part and remand for resentencing.

Defendant first argues that the trial court erred by repeatedly sustaining the prosecutor's hearsay objections and thus he is entitled to a new trial. We disagree.

The decision whether to admit or exclude evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Rockwell*, 188 Mich App 405, 410; 470 NW2d 673 (1995). "Gee's" statements to defendant were to be offered to show the effect they had on defendant and not for the truth of the matter asserted. *People v Fisher*, 449 Mich 441, 448-450; 537 NW2d 577 (1995); *People v Byrd*, 207 Mich App 599, 603; 525 NW2d 507 (1994). Therefore, the trial court abused its discretion when it excluded any reference to what Gee told defendant. *Id.* However, any error in the exclusion of these few specific statements was harmless.

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

Defendant's belief that the complainant consented to

not only getting in the car and engaging in sexual intercourse with Gee, but also explicitly agreed to engage in intercourse with him, was before the jury. MRE 103(a); *People v Travis*, 443 Mich 668, 686; 505 NW2d 563 (1993).

Next, defendant contends that several instances of prosecutorial misconduct denied him his right to a fair trial. We disagree.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Kulick*, 209 Mich App 258, 259-260; 530 NW2d 163 (1995). Even if the prosecutor's repeated hearsay objections were improper, the error was not prejudicial as the evidence of consent was placed before the jury. As well, the prosecutor's questions regarding defendant's use of crack cocaine on cross-examination were in response to statements defendant had made on direct examination concerning his use of crack cocaine in general and on the night in question. *People v Duncan*, 402 Mich 1, 16; 360 NW2d 58 (1977); *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989). See also *People v King*, 158 Mich App 672, 677; 405 NW2d 116 (1987), and *People v Bates*, 91 Mich App 506, 510; 283 NW2d 785 (1979). Lastly, even if the prosecutor did improperly define "reasonable doubt" during his closing argument, the trial court, in its instructions, told the jury that the attorney's comments and arguments were not evidence and correctly defined "reasonable doubt" for the jury and thus any error caused by the prosecutor's improper definition was cured. Therefore, defendant was not denied his right to a fair trial. *Kulick*, *supra* at 259-260.

Defendant also argues that the trial court erred in declining to give an instruction on "mere presence" and by improperly instructing the jury on the elements of CSC-3. We disagree.

Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995); *People v Dabish*, 181 Mich App 469, 478; 450 NW2d 44 (1989). The reviewing court must balance the general tenor of the instructions in their entirety against the potentially misleading effect of a single isolated sentence. *People v Freedland*, 178 Mich App 761, 766; 444 NW2d 250 (1989). Even if somewhat imperfect, instructions do not create error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Wolford*, 189 Mich App 478, 481; 473 NW2d 767 (1991).

Here, there was insufficient evidence to support the giving of an instruction on "mere presence." Defendant's conduct amounted to more than mere passivity and nonparticipation. He drove the complainant and the other man around, helped the other man take the complainant's clothes off of her and participated in the actual act. As well, he observed the other man having oral sex with the complainant. Furthermore, defendant's defense here was that of consent - not only that the complainant consented to having intercourse with him, but also with the other man. Therefore, a "mere presence" instruction is inapposite to the defense presented. *People v Moldenhauer*, 210 Mich App 158, 160-161; 533 NW2d 9 (1995). As such, the trial court properly declined to give the requested "mere presence" instruction.

With regard to the CSC-3 instruction on the charge of defendant's vaginal penetration, although not specifically stated in the elements listed, the trial court preceded its instruction by stating that the jury could find defendant guilty of CSC-3 if they believed he was unarmed, implying that through some type of force, even if unarmed, he coerced the complainant into engaging in vaginal intercourse. Furthermore, defendant was convicted of CSC-1 as to this count. As well, in instructing the jury on aiding and abetting the other man to commit two counts of CSC-3, the trial court specifically mentioned the element of force and coercion. The instructions as a whole thus covered the substance of the omitted instruction. *People v Bender*, 124 Mich App 571, 575; 335 NW2d 85 (1983). As well, even if somewhat imperfect, instructions do not create error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Wolford*, *supra* at 481.

Defendant also maintains that his conviction of two counts of CSC for a single penetration violated his constitutional right to be free from double jeopardy. The prosecution concedes that defendant's conviction of CSC-1 should be vacated. Therefore, we vacate defendant's CSC-1 conviction.

Defendant also asserts that the sentencing court improperly sentenced him for a crime which he did not commit and as such he is entitled to be resentenced. We agree.

Provided permissible factors are considered, appellate review of a defendant's sentence is limited to whether the sentencing court abused its discretion. *People v Coles*, 417 Mich 523, 550; 339 NW2d 440 (1983), overruled in part on other grounds *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990); *People v Odendahl*, 200 Mich App 539, 540-541; 505 NW2d 16 (1993). A judge errs when he sentences a defendant for a crime for which he has not been convicted. Thus, because defendant was sentenced to ten to twenty-five years for *armed robbery* when he was convicted of *unarmed robbery*, he was improperly sentenced. MCL 769.1; MSA 28.1072; *Coles*, *supra* at 531; *People v Ancksornby*, 231 Mich 271, 271; 203 NW 864 (1925).

Defendant further contends that the sentencing court improperly denied him credit for time served. We agree.

MCL 769.11b; MSA 28.1083(2) states that whenever any person serves time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court shall specifically grant credit against the sentence for such time served in jail prior to sentencing. The purpose of the statute is to put the indigent defendant who cannot post bail in an equal status with the defendant who can and thus courts must award credit for time served for those defendants who remain incarcerated because they were unable to post bail. *VanWert*, *supra* at 130; *People v Woodard*, 134 Mich App 128, 131; 350 NW2d 761 (1984). The prosecutor's assertion that a person who pleads guilty to being a habitual offender is not entitled to credit for time served is not supported by any relevant case law. On the contrary, a defendant who is convicted as a habitual offender is specifically entitled to credit for time served on the underlying offense. See MCL 769.13; MSA 28.1085; *In re Hoffman*, 326 Mich 368, 370; 40 NW2d 187 (1949).

Finally, defendant argues that he was denied his constitutional right to the effective assistance of counsel because his trial attorney failed to ensure that a "mere presence" instruction was presented to the jury, failed to object to the trial court's instructions of CSC-3, failed to properly respond to the trial court's decisions to sustain the prosecutor's hearsay objections, failed to correct the court's erroneous belief that defendant had previously been convicted of armed robbery rather than unarmed robbery, failed to object to sentencing for two counts of CSC for only one penetration, and failed to challenge the prosecutor's assertion that defendant was not entitled to any credit because he was convicted of an habitual offender charge. We agree.

To establish a claim for ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel was not functioning as an attorney as guaranteed by the Sixth Amendment to the United States Constitution. Moreover, the defendant must overcome the presumption that the challenged action could be considered sound trial strategy. As well, the defendant must show that any deficiency was prejudicial to his case. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995); *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991) (citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 [1984]).

With regard to the claims that counsel failed to ensure that a "mere presence" defense was presented to the jury, failed to object to the trial court's instructions of CSC-3, failed to properly respond to the trial court's decisions to sustain the prosecutor's hearsay objections, and failed to object to sentencing defendant for two counts of CSC for only one penetration, any purported deficiency was not prejudicial to defendant's case and thus cannot be grounds for reversal. *LaVearn, supra* at 213; *Tommolino, supra* at 17. With regard to the other alleged errors which occurred during sentencing, this Court is of the opinion that counsel erred in failing to correct the court's erroneous belief that defendant had previously been convicted of armed robbery rather than unarmed robbery and erred in failing to adequately challenge the prosecutor's erroneous assertion that defendant was not entitled to any credit because he was convicted of an habitual offender charge. *LaVearn, supra* at 213. However, even if ineffective assistance of counsel is established, the remedy must be tailored to the injury suffered. *People v Whitfield*, 214 Mich App 348, 354; 543 NW2d 347 (1995). Thus because counsel did not commit any grave errors during trial, defendant was properly convicted and a new trial is not warranted. Counsel's errors only occurred during sentencing and therefore a remand for resentencing is sufficient to overcome any error due to counsel's deficiencies. *Id.*

Affirmed in part, reversed in part and remanded for resentencing. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ William E. Collette

I concur in the result only.

/s/ Maureen Pulte Reilly