

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

January 31, 1997

Plaintiff-Appellee,

v

No. 178720

PAUL GEORGE KAILAS,

Kent Circuit Court

LC No. 94-0061-FC

Defendant-Appellant.

Before: Smolenski, P.J., and Markey and J.C. Kingsley,* JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury for soliciting another to commit assault with the intent to cause great bodily harm, MCL 750.157b; MSA 28.354(2). Defendant was sentenced to a minimum of three years and four months' imprisonment and a maximum of five years' imprisonment. We affirm.

I

Defendant first argues on appeal that he was denied a fair trial as the result of the admission of testimony from a sixteen-year-old witness who alleged that defendant forced her to have sex with him in order to "pay" for her stay at his apartment and that she contracted a sexually transmitted condition from defendant. Although we agree that the evidence is inflammatory, we find that defendant is not entitled to any relief because a review of the record reveals that not only did defendant fail to object to its admission, he actually elicited a great amount of related testimony with the hope of later using that evidence to undermine the witness' credibility. We find that defendant, having done so, cannot now claim as error evidence that he purposely used to support his defense theory. *People v Potra*, 191 Mich App 503, 512; 479 NW2d 707 (1991).

Furthermore, although defendant contends that the prosecution initially elicited the testimony in violation of MRE 404(b), which forbids the admission of character evidence to show that defendant acted in conformity therewith, we conclude that the prosecutor was free to explore that area because

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

defendant had already injected his character into issue. See MRE 404(a)(1); See *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993). The defense raised the implication that defendant was a peaceful man, or more specifically, that he was not a “fighter” and had simply been pushed around in the present case. Thus, the defense opened the door for the prosecution to elicit testimony to rebut that conclusion.

Even if the evidence were admitted in error, it nonetheless was not outcome determinative or presumed to be prejudicial. *People v Figgures*, 451 Mich 390, 402; 547 NW2d 673 (1996); *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994). We find that the testimony was a small portion of a rather lengthy trial wherein several witnesses, including a police officer, testified that defendant had threatened to harm the victims. Thus, defendant is not entitled to a new trial.

II

Next, defendant argues that the lower court abused its discretion in allowing defendant’s psychiatrist to testify on rebuttal, over objection and in violation of the doctor-patient privilege. Again, although we find that the doctor’s testimony was improperly admitted, the error was harmless. *Figgures, supra*.

In determining that the evidence was improperly admitted, we first note that the prosecutor purposely, and improperly, attempted to elicit a denial from defendant on cross-examination in order to create an issue that could be rebutted. Cf. *Figgures, supra* at 401. Second, we find that the doctor’s testimony was not truly contradictory in nature but rather little more than an expert’s confirmation of what defendant essentially conceded during the case in chief. Third, we find that defendant’s vague and brief statements concerning his counselors did not amount to a waiver of the doctor-patient privilege.

Nonetheless, we conclude that the admission of the doctor’s testimony was merely cumulative and not outcome determinative, considering the fact that there was other testimony heard concerning defendant’s anger toward the victims and his desire to harm them. *Figgures, supra* at 402. Thus, defendant is not entitled to a new trial. See also *People v Hubbard*, 209 Mich App 234, 243; 530 NW2d 130 (1995).

III

Last, defendant argues that the sentencing court abused its discretion in imposing the most severe sentence allowed under statutory law for the offense committed. We disagree and find that defendant’s sentence does not violate the principle of proportionality. *People v Cervantes*, 448 Mich 620, 622, 625-630; 532 NW2d 831 (1995); *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990). A review of the record reveals that the crime was a serious one that defendant thoroughly contemplated, planned, and pursued, that defendant’s threats were serious, that defendant had already been convicted for previously harassing the victim, and that defendant admitted to other illegal activity. Accordingly, defendant is not entitled to resentencing.

Affirmed.

/s/ Michael R. Smolenski

/s/ Jane E. Markey

/s/ James C. Kingsley