STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES KEITH MALCUM,

Defendant-Appellant.

UNPUBLISHED
March 28, 1997

No. 180252
Recorder's Court
LC No. 94-000489

Before: Jansen, P.J., and Saad and M.D. Schwartz,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(e); MSA 28.788(2)(1)(e), and one count of larceny in a building, MCL 750.360; MSA 28.592. Defendant was sentenced to concurrent terms of twenty to thirty years' imprisonment for each of the CSC I convictions and one to four years for the larceny conviction. Defendant appeals as of right and we affirm.

Defendant first argues that there was insufficient evidence to convict him of CSC I and larceny in a building, particularly when the complainant's testimony was incredible. We review a challenge to the sufficiency of the evidence by looking at the evidence in the light most favorable to the prosecution and determining whether a rational trier of fact could have concluded that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992); amended 441 Mich 1201 (1992).

The act of CSC I is committed when there is an intrusion or penetration into the genital or anal opening of another person under one of the eight circumstances enumerated under MCL 750.520b(1); MSA 28.788(2)(1), regardless of the sexual purpose of the actor or lack of such purpose. *People v Garrow*, 99 Mich App 834, 837-838; 298 NW2d 627 (1980). The elements of the offense of larceny in a building include the actual or constructive taking of goods or property, the carrying away or asportation with felonious intent of goods or personal property of another, without the consent and

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

against the will of the owner, within the confines of a building. *People v Mumford*, 171 Mich App 514, 517-518; 430 NW2d 770 (1988). The crime of "[l]arceny in a building is complete as soon as there is the slightest taking of property with the intent to steal it." *Id*., p 518.

There was testimony that police officers responding to a 911 call found the complainant outside a neighbor's home, in a highly emotional state, dressed only in a nightshirt. The complainant also told the officers that defendant had forced him to perform fellatio on defendant and allow defendant to have anal intercourse with him more than one time that morning. In addition, defendant was subsequently discovered locked behind a security gate in the stairway leading to the complainant's attic bedroom, and the screwdriver and knife that defendant wielded at various times during the incident were found in the bedroom. Furthermore, the complainant testified that certain personal items had been taken from his house, and defendant admitted during a subsequent interview with the police that he took those items. Moreover, whether the complainant or any other witness was to be believed was a question properly left for the jury to decide. *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988). Thus, there was sufficient evidence to sustain defendant's conviction for two counts of CSC I and one count of larceny in a building.

Defendant next contends that because defense counsel failed to investigate whether the complainant was actually HIV positive at the time of the alleged sexual assault, he was denied the effective assistance of counsel. Had defense counsel investigated the issue and the complainant been found not to be HIV positive, defendant argues, the complainant's credibility would have been sufficiently impeached and the outcome of the trial would have been different. Furthermore, defendant contends that the medical records of the complainant have been subpoenaed pursuant to the trial court's granting of a post-trial motion for discovery and those records will prove that the complainant's testimony should not have been believed.

Because defendant failed to move for a new trial or an evidentiary hearing on this issue, our review is limited to the existing record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Johnson (On Rehearing)*, 208 Mich App 137, 142; 526 NW2d 617 (1994). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that he was prejudiced as a result of the deficiency. *People v LaVearn*, 448 Mich 207, 217; 528 NW2d 721 (1995). "To merit a new trial on the basis of newly discovered evidence, a defendant must show that the evidence (1) is newly discovered, (2) is not merely cumulative, (3) would probably have caused a different result, and (4) was not discoverable and producible at trial with reasonable diligence." *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). "[N]ewly discovered evidence is not grounds for a new trial where it would be used merely for impeachment purposes." *People v Bradshaw*, 165 Mich App 562, 567; 419 NW2d 33 (1988) (quoting *People v Stricklin*, 162 Mich App 623, 632; 413 NW2d 457 (1987)).

Here, defendant has failed to show how he was prejudiced by defense counsel's alleged failure to investigate whether the complainant was actually HIV positive at the time of the sexual assault. In fact, the record shows that defense counsel repeatedly attacked the complainant's credibility throughout the entire trial. Furthermore, even if defendant could make a post-trial showing that the complainant

was HIV positive at the time of the incident, that showing would not be enough to merit a new trial. *Bradshaw*, *supra*, p 567. Accordingly, we find that defendant was not deprived of the effective assistance of counsel.

Defendant next argues that the trial court erred when it instructed the jury that if it was convinced of defendant's guilt based solely on the complainant's testimony, there was no need of additional evidence. However, because defendant failed to object below, and there is no manifest injustice, see MCL 750.520h; MSA 28.788(8), we need not address this issue. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993).

In a supplemental brief filed after oral argument, defendant raises an additional issue. He claims that the trial court abused its discretion in permitting testimony concerning out-of-court statements made by the complainant as excited utterances under MRE 803(2).

At trial, the trial court permitted police officers to testify regarding the complainant's statements made to them after the alleged offense. Police officers arrived at the scene at approximately 3:15 a.m., and described the complainant's demeanor as excited, distraught, almost hysterical, and very scared. Complainant told the officers that defendant had "forced sex on him in his own house." Defendant objected to the police officers testifying in such a manner, but the trial court permitted the testimony, finding that it was admissible as excited utterances under MRE 803(2).

We find no abuse of discretion on the part of the trial court. *People v Kowalak (On Remand)*, 215 Mich App 554, 558; 546 NW2d 681 (1996). In order for a statement to be admitted into evidence as an excited utterance, three criteria must be met. First, the statement must arise out of a startling event; second, it must be made before there has been time for contrivance or misrepresentation by the declarant; and third, it must relate to the circumstances of the startling event. *People v Straight*, 430 Mich 418, 424; 424 NW2d 257 (1988).

Shortly after the assault, complainant called a friend who arrived at his house. According to the friend, complainant was in a highly agitated, emotional state. When the police officers arrived, they too testified that complainant was distraught, excited, almost hysterical, and scared. Clearly, the first and third criteria have been established. That is, the statements arose out of a startling event (an alleged rape) and the statements related to the circumstances of the startling event. It is defendant's contention that there had been time for complainant to contrive his statements. We do not agree because the record indicates that the statements were made when complainant was still under the influence of an overwhelming emotional condition. *Straight*, *supra*, p 425.

The time frame is somewhat difficult to narrow down, however, the police officers testified that they received a radio run at approximately 3:15 a.m. According to defendant's police statement, he arrived at complainant's house at approximately 2:00 a.m. for the third and final time that night. As best as can be determined from the transcripts, the offense occurred sometime between 2:00 a.m. and 2:30 a.m. In any event, while there was sufficient time for complainant to contrive the statements, the evidence was that complainant was in a highly agitated and emotional state when his friend arrived

shortly after the assault. He was still in a distraught, scared, excited, and almost hysterical state when the police officers arrived. Therefore, it can be reasonably inferred that complainant was under the influence of an overwhelming emotional condition, especially in considering the nature of the assault in this case, when he gave his statements to the police.

Accordingly, we conclude that the trial court did not abuse its discretion in permitting the complainant's out-of-court statements under the excited utterance exception to the rule against hearsay.

Last, we address defendant's sentencing issue. Defendant contends that the sentences imposed for the two CSC I convictions were disproportionate, particularly given his limited criminal history, his strong family support, and the fact that the trial court took into account the fact that the police officers treated the complainant poorly when the officers discovered that the complainant is gay.

The twenty-year minimum sentences imposed for defendant's two CSC I convictions was well within the minimum sentence guidelines range of 180 to 360 months. *People v Broden*, 428 Mich 343, 354; 408 NW2d 789 (1987); *People v Albert*, 207 Mich App 73, 75; 523 NW2d 825 (1994). Additionally, defendant's prior convictions consisted of assault and battery, disorderly conduct, and carrying a concealed weapon. Further, defendant beat the complainant and wielded a screwdriver and broken bottle during the commission of the offenses. Defendant's proffered reasons that his sentences are disproportionate is insufficient to overcome the presumption that his sentences were proportionate. We find no abuse of the sentencing court's discretion in this case. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

Affirmed.

/s/ Kathleen Jansen
/s/ Henry William Saad
/s/ Michael D. Schwartz