STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HUGH LANE, JR.,

Defendant-Appellant.

UNPUBLISHED
May 16, 1997

No. 189483
Cass Circuit Court
LC No. 94-8056-FC

Before: Griffin, P.J., and Doctoroff and Markman, JJ.

PER CURIAM.

Defendant was convicted of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(e); MSA 28.788(2)(1)(e). The trial court sentenced defendant as an habitual offender, second offense, MCL 769.10; MSA 28.1082, to twenty to forty years' imprisonment. Defendant appeals his conviction and sentence as of right. We affirm.

Defendant first claims on appeal that there was insufficient evidence upon which he could be convicted of CSC I. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Jacques*, 215 Mich App 699, 702-703; 547 NW2d 349 (1996). Defendant was convicted of engaging in sexual penetration of another while armed with a weapon. MCL 750.520b(1)(e); MSA 28.788(2)(1)(e). Therefore, the prosecutor had to prove (1) that defendant engaged in sexual penetration of the victim and (2) that he was armed with a weapon.

The victim, a former girlfriend of the defendant's, testified that defendant woke her up in her bed, pulled her by the arm out to his van and began accusing her of infidelity. The victim testified that defendant struck her on the head, arms and legs numerous times with some type of club, as he yelled at her and called her vulgar names. The victim identified a broom handle, found in the van during the search conducted by the police, as the club that defendant struck her with. The victim testified that defendant then grabbed her by the neck and began choking her, threatening to "rip her throat out."

Thereafter, the victim testified that defendant said that if she was going to mess around on him that he had something for her and pulled out a flashlight. Defendant then ordered her to go to the back of the van and remove her clothes. The victim testified that she complied with his request because she was afraid but she cried and begged him to stop. Defendant again struck her on the head. The victim testified that defendant then told her to get on her knees so that he could put the flashlight inside her and threatened to put it "inside her butt" if she did not cooperate.

Defendant acknowledged that things got out of hand in the van and that he yelled mean and obscene things at the victim. Defendant further acknowledged that he backhanded the victim one time across the face, causing the bruise on her eye, and that he grabbed her by the neck and pushed her down several times. He also acknowledged that he threatened the victim with a club although he claimed that he never actually picked up the club. Finally, defendant acknowledged that he asked the victim if she wanted the flashlight because he wanted her to feel humiliated.

Based on these facts, there is sufficient evidence that defendant engaging in sexual penetration of the victim while armed with a weapon. The broom handle used by defendant to repeatedly strike the victim, leaving bruises on her face arms, legs and chest, was a "weapon" within the meaning of the statute. Moreover, defendant need not have had the weapon in his hands while committing the offense charged, so long as he has knowledge of the weapon's location and the weapon was reasonably accessible to him. *People v Davis*, 101 Mich App 198, 203; 300 NW2d 497 (1980). Dr. Guzzo's testimony that the victim's injuries were consistent with being struck with the broom handle was further evidence of defendant's use of a weapon.

Defendant claims that he could not be convicted of CSC I because the evidence shows that the victim herself willingly inserted the flashlight into her vagina. It is not clear from the testimony presented at trial whether the victim or defendant initially inserted the flashlight into the victim's vagina. The victim first testified that defendant inserted the flashlight, but later stated that she was not sure because it happened so fast. The victim was certain that defendant allowed her to take control of the flashlight at some point because she was screaming and crying in pain; the victim "thought something was going to break." Defendant claimed that the victim inserted the flashlight herself but stated that he took hold of the flashlight at some point.

Even if the victim initially inserted the flashlight, the jury could have reasonably inferred that she complied with defendant's demands out of coercion and fear of further physical abuse. In other words, the jury could have inferred that defendant *caused* the flashlight to be inserted into the victim's vagina. Sexual penetration is defined by MCL 750.520a(l); MSA 28.788(1)(l) as "sexual intercourse or any other intrusion, however slight, of any part of a person's body, *or of any object into the genital or anal openings of another person's body*, but emission of semen is not required." Thus, insertion of a flashlight into the victim's vagina would be considered sexual penetration under the statute. However, the use of "force" is not a necessary element under MCL 750.520b(1)(e); MSA 28.788(2)(1)(e).

Finally, defendant claims that the jury could not find defendant guilty because the victim subsequently instigated sexual relations with defendant. Defendant testified that, after the incident

involving the flashlight, the victim came over to him and initiated sexual intercourse. It should be noted that the prosecutor's case was based only on the incident involving the flashlight, not the subsequent sexual intercourse; therefore, the subsequent sexual intercourse has no direct bearing on whether the victim consented to penetration with the flashlight. Nevertheless, the victim testified that she only suggested that they have "regular" sex while she was being assaulted with the flashlight because it would have been less painful than what she was experiencing. As a result of her request, defendant allowed her to remove the flashlight and they had "regular" sex. It was for the trier of fact to weigh the credibility of the witnesses and determine which version of these facts to believe. *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988).

Defendant next claims that the trial court erred in admitting photographs of the victim into evidence because they were more prejudicial than probative and did not fairly and accurately depict the victim's condition following the alleged sexual assault. The decision to admit or exclude photographs is within the sound discretion of the trial court. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909, modified and remanded 450 Mich 1212 (1995). The proper inquiry is always whether the probative value of the photographs is substantially outweighed by unfair prejudice. *Id.*; MRE 403.

At issue are photographs of the victim taken at the at the hospital the day after the assault. Defendant objected several times to the admission of the photographs at trial. Defense counsel argued that the photographs were not an accurate representation of the victim's condition following the assault because they exhibited unnatural discoloration. In one exhibit, the victim's face has yellow spots on her forehead, hair and chin and in other exhibits, there are yellow horizontal stripes alternating with horizontal purple stripes. Defense counsel argued that the yellow spots made the victim look jaundiced or as if she had extensive old bruising. In addition, defense counsel argued that it was not clear whether the purple stripes were bruises or some type of discoloration caused by the camera or by the photographic development.

With respect to these exhibits, the victim and her attending nurse both testified that the victim's skin did not have yellow spots or bands. The nurse further testified that she believed that the discoloration was caused by the camera. The trial court also cautioned the jury:

> As you look at the photographs, you will see it looks like horizontal yellow bands going across her. From her testimony, those bands are not an accurate depiction of what she looked like at the time. That has to be something that has occurred through developing of the film or through taking them.

Therefore, the jury was on notice of the discoloration on these exhibits. The alternating yellow and purple horizontal bands extended all the way across these exhibits, not just across the victim's legs; therefore, a reasonable juror could readily determine that those bands were not bruises. In addition, the many small rounded bruises on the victim's face and legs were accurately depicted despite the bands of discoloration. In addition, other exhibits did not contain the yellow spots or yellow and purple bands and presented a clear and accurate depiction of the bruises on the victims face and legs.[1]

Additionally, defendant argues that the photographs should not have been admitted because they merely duplicated the victim's testimony. This argument was never raised before the trial court and thus, is not properly before this Court on appeal. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Nevertheless, the Supreme Court has clearly held that photographs are not excludable simply because a witness can orally testify regarding the information contained in the photographs. *Mills*, *supra* at 76. Photographs may be used to corroborate a victim's testimony. *Id.* The photographs were probative of defendant's use of a weapon, specifically a broom handle, and his use of force or coercion. Taken as a whole, the probative value of the photographs outweighed the danger of unfair prejudice; therefore, the photographs were properly admitted.

Next, defendant claims on appeal that the trial court committed error when it denied defendant's challenge for cause and forced defendant to expend one of his peremptory challenges. The trial court's decision on a challenge for cause will be reversed only where this Court finds a clear abuse of discretion. *People v Skinner*, 153 Mich App 815, 819; 396 NW2d 548 (1986). During voir dire the trial court asked the potential jurors if they or any of their friends or relatives had been the victims of violent criminal acts. One juror stated that her sister had been a victim of domestic violence for the past eight years. According to the juror, her brother-in-law had recently been prosecuted and spent time in jail. Defendant made a challenge for cause because the juror told defense counsel that it would be difficult for these events not to influence her decisions. In denying defendant's challenge for cause, the trial court noted that it was satisfied that the juror could serve impartially. Defendant subsequently used a peremptory challenge to excuse the juror from the panel.

The trial court did not abuse its discretion in denying defendant's challenge for cause. Although the juror told defense counsel that it was difficult for her sister's situation not to influence her decisions, she expressly stated that she could hear this case fairly and impartially. She further recognized that every situation was different and that she could not judge this case based on her sister's experience. The trial court was not required to dismiss her for cause. *People v Lee*, 212 Mich App 228, 249; 537 NW2d 233 (1995).[2]

Defendant next claims on appeal that the trial court abused its discretion by not allowing defense counsel to impeach the victim with regard to a collateral matter -- her alleged perjury in a prior criminal prosecution also involving defendant. The victim testified against defendant in a 1988 prosecution in which he was also convicted of assaulting her with a dangerous weapon. Defendant claims that, after his conviction, the victim recanted her testimony under oath. According to defendant, the victim's alleged perjury in the prior proceedings against him was material to defendant's guilt or innocence in the instant case because it strongly negated the victim's credibility. However, the victim was never charged or prosecuted for perjury nor was defendant's conviction ever set aside on the basis of the alleged recantation. Moreover, the prosecutor indicated that the recantation was not under oath but in a letter she wrote to the trial court following defendant's conviction.

MRE 608(b) allows cross-examination regarding instances of specific conduct that bear on a witness' character for truthfulness or untruthfulness when the evidence is being offered to attack the credibility of the witness. The impeachment of a witness on a collateral matter is within the sound

discretion of the trial court. MRE 608(b); *People v Slayton*, 135 Mich App 328, 337; 354 NW2d 326 (1984). Testimony regarding prior instances of perjury is generally admissible as bearing on truthfulness. See *People v Ramsey*, 89 Mich App 260, 268; 280 NW2d 840 (1979). However, in this case, the victim was not charged or convicted of perjury. Nor was the court presented with the alleged letter of recantation. Further, as the trial court explained, in order to determine whether the victim actually perjured herself at trial, or whether the recantation itself was false, the court would have been required to conduct a "mini-trial" relating to the prior, unrelated case seven years earlier Therefore, the trial court did not abuse its discretion by precluding cross-examination on the matter.[3]

Finally, defendant claims on appeal that, in light of the mitigating factors surrounding his prior felony conviction, his sentence was disproportionate. Defendant was sentenced as an habitual offender, second offense, to twenty to forty years' imprisonment. This Court may not consider the sentencing guidelines in reviewing the sentences for habitual offenders. *People v Gatewood*, 450 Mich 1025; 546 NW2d 252 (1996); *People v Cervantes*, 448 Mich 620, 625; 532 NW2d 831 (1995). Appellate review of an habitual offender's sentence is limited to considering whether the sentence violates the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). *Cervantes, supra* at 631; *People v Gatewood* (On Remand), 216 Mich App 559, 560; 550 NW2d 265 (1996). A sentence must be proportionate to the seriousness of the crime and the defendant's prior record. *Milbourn, supra* at 635-636, 654.

Defendant was thirty-one years old at the time of sentencing. With respect to defendant's prior record, he had pleaded guilty to three misdemeanors: larceny under $100, reckless driving, and trespassing at the victim's apartment. Defendant also had the one felony conviction for assault with a dangerous weapon in 1988.[4] Defendant claims that the court ignored the fact that the victim allegedly recanted her testimony in the prior felony proceeding and that she moved back in with defendant after he was released from jail in 1991.

The trial court noted that the sentencing guidelines do not apply for purposes of sentencing an habitual offender, but nevertheless used the guidelines as a starting point. Although sentencing guidelines do not apply to habitual offenders and may not be considered on appeal, the guidelines may be considered by the trial court at their discretion. *People v Haake*, 217 Mich App 434, 438; 553 NW2d 15 (1996). The court noted that the guidelines indicated a sentence of 180 to 360 months but, after considering defendant's habitual status, sentenced defendant to 20 to 40 years. Despite defendant's contrary assertion, the trial court did consider the victim's alleged recantation in the earlier case in fashioning this sentence. We find no abuse of discretion in the trial court's sentence here.

Affirmed.

/s/ Richard Allen Griffin
/s/ Martin M. Doctoroff
/s/ Stephen J. Markman

[1] Defendant also appears to make the argument on appeal that the photographs were unduly prejudicial, aside from the discoloration. Defendant failed to state any grounds for undue prejudice separate from the alleged discoloration; therefore, that portion of his claim is waived. *People v Jones (On Reh)*, 201 Mich App 449, 457; 506 NW2d 542 (1993).

[2] Even if the trial court abused its discretion in denying defendant's challenge for cause, the court's error would not warrant reversal in this case. A four-part test is used to determine whether an error in refusing a challenge for cause merits reversal. There must be a clear and independent showing on the record that (1) the court improperly denied a challenge for cause, (2) the aggrieved party exhausted all peremptory challenges, (3) the party demonstrated the desire to excuse another subsequently summoned juror, and (4) the juror whom the party wished to later excuse was objectionable. *Lee, supra* at 248-249. Defendant does not allege that, after he had exhausted all of his available peremptory challenges, there was an additional objectionable juror that he wished to excuse. Therefore, there was no prejudice to defendant.

[3] By the same token, we feel compelled to state that it would not have been an abuse of discretion for the trial court to have *admitted* such evidence under reasonable conditions.

[4] The trial court observed that defendant was tried for kidnapping and CSC I but that he was convicted of the lesser offense of felonious assault