STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JESSIE DAVID JONES,

Defendant-Appellant.

UNPUBLISHED
August 12, 1997

No. 191774
Recorder's Court
LC No. 93-007149-FH

Before: Murphy, P.J., and Kelly and Gribbs, JJ.

PER CURIAM.

Defendant was convicted by a jury of third-degree criminal sexual conduct, MCL 750.520d; MSA 28.788(4). He was sentenced to ten to fifteen years in prison, to be served consecutive to defendant's sentence in another case. Defendant now appeals as of right and we affirm.

This case involves a sexual assault committed against a twenty-five year old woman. Defendant allegedly engaged in intercourse with the complainant on two separate occasions during the early morning hours of September 20, 1992. Ultimately, the case went to the jury on two counts of third-degree criminal sexual conduct. The charges were labeled Count I and Count III. The trial judge did not describe which count related to which act of alleged sexual penetration. On appeal, defendant argues that reversal is warranted because the trial judge did not give a specific unanimity instruction. We disagree.

Defendant's reliance on *People v Cooks*, 446 Mich 503; 521 NW2d 275 (1994), is misplaced. That case pertains to situations in which multiple acts are presented as evidence of a single offense. Defendant has cited no authority suggesting that the trial court is required to give a more specific instruction where the accused is charged with committing two distinct unlawful acts and the case goes to the jury on two counts. This Court will not search for authority to sustain or reject a party's position. *People v Hunter*, 202 Mich App 23, 27; 507 NW2d 768 (1993). Moreover, defendant did not raise this issue in the trial court, nor did he object to the judge's instructions on this basis. Accordingly, our review is limited to the issue of whether relief is necessary to avoid manifest injustice. *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995).

Although the trial judge did not tell the jurors which count corresponded to which assault, the jurors were made aware of that fact by the prosecutor. During his opening argument, the prosecutor told the jurors that Count I referred to the first act of sexual penetration committed by defendant on September 20, 1992. In addition, the prosecutor stated that Count III referred to the sexual assault which allegedly occurred at the bottom of the stairway leading out of defendant's apartment. Neither the trial judge nor defense counsel took exception to the prosecutor's characterization of the charges. Thus, it appears that both the judge and the parties were operating under the assumption that the charges were labeled in chronological order with regard to the alleged acts of sexual penetration.

Moreover, this was not a complex case. The complainant's testimony was the primary evidence introduced against defendant. Although defense counsel attempted to impeach complainant's credibility on cross-examination, there was no suggestion that the complainant was being truthful with regard to only one of the alleged acts of sexual penetration. Defendant's position was that no sexual assault occurred. It was obvious that the verdict turned on whether the jury believed the complainant's testimony. Given the nature of the evidence and defendant's theory of the case, we find that the failure to give a more specific instruction did not impede the defense or deny defendant a fair trial. See e.g. *People v Van Dorsten*, 441 Mich 540, 545; 494 NW2d 737 (1993). Therefore, reversal is not warranted on the basis of this unpreserved issue.

Defendant next contends that he was denied a fair trial by numerous comments made by the trial judge during voir dire. Defendant did not object to any of the allegedly improper remarks. In the absence of a timely objection, this Court need not review allegations of error based on the conduct of the trial court absent manifest injustice. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995).

Although a trial judge has wide discretion and power in matters of trial conduct, that power is not unlimited. *People v Romano*, 181 Mich App 204, 220; 448 NW2d 795 (1989), quoting *People v Collier*, 168 Mich App 687, 697; 425 NW2d 118 (1988). If the trial court's conduct pierces the veil of judicial impartiality, a defendant's conviction must be reversed. *Id.* The test for determining whether a trial judge's conduct or comments pierced the veil of judicial impartiality is whether the court's conduct or comments were of such a nature as to unduly influence the jury and thereby deprive the defendant of a fair and impartial trial. *People v Sharbnow*, 174 Mich App 94, 99; 435 NW2d 772 (1989). Portions of the record should not be taken out of context in order to determine whether the trial court exhibited bias against defendant; rather, the record should be reviewed as a whole. *Paquette*, *supra*, 214 Mich App 340.

Defendant argues that the trial judge erred when he told the prospective jurors that a prostitute can be raped. We disagree. It should be noted that this issue arose only because a prospective juror admitted that she was once arrested for prostitution.

The principle that any individual can be raped, including a prostitute, is an accurate statement of the law. Moreover, neither party argued or suggested that the complainant in this case was a prostitute. Rather, defendant's position was that no sexual assault occurred. The trial judge's conduct in this matter did not pierce the veil of judicial impartiality.

Defendant next argues that reversal is warranted because the trial judge stated that "women are honest" and implied that men are not "brave." Reviewing the record as a whole, we disagree. Although the judge characterized women jurors as honest, in no way did he suggest that the complainant was truthful or that defendant was a liar. In making his comments, the trial judge was trying to stress to the prospective jurors the importance of being truthful during voir dire.

Defendant argues that the trial judge committed error when he told the jurors that he could be guilty of criminal sexual conduct. Although the record is somewhat ambiguous, it appears that the judge actually simulated the response of a hypothetical male juror who, after learning of the elements of criminal sexual conduct, realized that he may have committed an unlawful act. This was also done in an attempt to demonstrate to the jurors the importance of being truthful during voir dire.

Next, defendant contends that the trial judge became an advocate for the prosecution in instructing the jurors regarding how to determine whether a witness is credible. Once again, we disagree. The judge was merely attempting to explain to the jurors that inconsistent statements are only one of the many things the jury should weigh, and that the jury may find a witness credible even if his or her testimony is somewhat inconsistent on unimportant matters. In general, the trial judge's comments were consistent with the standard jury instructions regarding witness credibility. See CJI2d 2.6 and 3.6. Moreover, the trial judge instructed the jury in accordance with the standard instructions after voir dire and again during final jury instructions. During final jury instructions, the judge told the jurors that they could consider the complainant's prior inconsistent statements in determining whether the witness was being truthful. On both occasions, the judge told the jurors that one factor to consider with regard to witness credibility is whether he or she "seems to have a good memory." Under such circumstances, defendant's right to a fair trial was adequately safeguarded

We have carefully reviewed the remaining allegations of judicial misconduct and find no manifest injustice.

Next, defendant argues that the trial court erred in imposing consecutive sentences under MCL 768.7b; MSA 28.1030(2)(1), because the offense upon which this case is based was committed prior to the incident underlying defendant's other conviction. To the extent that the trial judge based its decision on that statute, resentencing is not warranted. MCL 768.7b; MSA 28.1030(2)(1), provides that a person who "commits a subsequent offense that is a felony" and is "convict[ed] of the subsequent offense" pending the disposition of another felony charge may be sentenced consecutively for the prior charged offense and the subsequent offense. Defendant was convicted of two such offenses. A warrant was issued in the instant case on March 23, 1993, almost one month before the offenses giving rise to defendant's conviction in the other case were committed. The fact that defendant was sentenced for the subsequent offense before being sentenced for the prior offense does not prevent the sentence on the prior offense from running consecutively. *People v Kaake*, 118 Mich App 71, 73; 324 NW2d 488 (1982). Consecutive sentences may be imposed on the "prior" or the "subsequent" offense regardless of the chronological order in which the defendant is sentenced. *Id.*

Defendant next contends that it was improper for the trial judge to have assessed twenty-five points for offense variable 2 (OV 2) when it is unclear which act of sexual intercourse formed the basis

for the conviction. Even if defendant's characterization of the verdict is correct, resentencing is not warranted on this basis. Both assaults were relevant to the scoring decision. A sentencing court may also consider criminal activity that is not the basis for defendant's conviction. *People v Coulter (After Remand)*, 205 Mich App 453, 456; 517 NW2d 827 (1994).

Finally, defendant argues that reversal is warranted because the trial judge misapplied the guidelines in scoring twenty-five points under OV 2. Defendant's challenge is directed not to the accuracy of the factual basis for the sentence imposed, but rather, to the trial court's calculation of the sentencing variable on the basis of its discretionary interpretation of the unchallenged facts. Under such circumstances, the challenge does not state a cognizable claim for relief. *People v Mitchell*, 454 Mich 145, 174-177; 560 NW2d 600 (1997).

Affirmed.

/s/ William B. Murphy
/s/ Michael J. Kelly
/s/ Roman S. Gribbs