STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD BOWMAN,

Defendant-Appellant.

UNPUBLISHED
October 17, 1997

No. 193027
Recorder's Court
LC No. 95-004422

Before: Fitzgerald, P.J., and Markey and J. B. Sullivan*, JJ.

PER CURIAM.

Defendant was convicted by a jury of four counts of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(c); MSA 28.788(4)(1)(c), and one count of fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e(1)(b); MSA 28.788(5)(1)(b). He was sentenced to four concurrent terms of seven to fifteen years' imprisonment for the CSC III convictions and to a term of six months to two years for the CSC IV conviction. Defendant appeals as of right. We affirm, but remand for preparation of an amended presentence investigation report.

The jury convicted defendant of engaging in anal intercourse, fellatio, digital penetration, and masturbation with the thirty-two year-old mentally impaired son of his neighbors. The victim lived across the street from defendant's family for approximately fifteen years before moving into a nearby apartment with another mentally impaired man in 1993. After the move, the victim frequently visited defendant at his home and joined him for lunch. According to the victim, during these visits defendant fondled his genitals, they performed fellatio on each other, they engaged in anal intercourse, and digitally penetrated each other. Defendant stated to a police officer that he and the victim masturbated each other but denied that they engaged in fellatio and anal intercourse.

Defendant contends that the trial court erred in declining to suppress his inculpatory statement on the grounds that it was the product of coercion and induced by promises of leniency. We disagree. In reviewing the trial court's determination regarding voluntariness, this Court examines the entire record and makes an independent determination. *People v Peerenboom,* 224 Mich App 195, 198; __

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

NW2d __ (Docket No. 191208; issued 6/13/97) slip op p 2. However, we will defer to the trial court's superior ability to view the evidence and witnesses and will not disturb the court's findings of fact unless they are clearly erroneous. *Id.* In assessing voluntariness, we must analyze the totality of the circumstance surrounding the confession in order to determine whether it was freely and voluntarily made. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).

Upon review of the totality of the circumstances surrounding defendant's statement, we conclude that the trial court did not err in determining that the statement was voluntary. Defendant was not under arrest and voluntarily participated in the interview. The officers advised defendant of his constitutional rights and defendant knew the nature of the accusations against him. Although the officers questioned defendant at length, they allowed him to take a break when he requested time to take medication and drink water. The interrogating officers did not physically harm defendant or threaten him with harm. The record is simply devoid of any evidence suggesting that the officers coerced defendant into making the statements. Thus, we find that defendant's statement was not the product of threats or coercion. *Cipriano, supra* at 334.

Defendant nevertheless contends that his statement was involuntary because it was induced by promises of leniency. *People v Shelson*, 150 Mich App 718, 724-725; 389 NW2d 159 (1986). A confession will be considered the product of a promise of leniency if the defendant is likely to have reasonably understood the statements as a promise of leniency and if the defendant relied upon the promise in making his confession. *People v Butler*, 193 Mich App 63, 69; 483 NW2d 430 (1992). Upon careful review of the record in this case, we find that while the officers suggested that defendant's cooperation could result in less media exposure and a quicker resolution of the charges, they never promised him lenient treatment. The officers clearly stated that the prosecutor would make the decision about whether to charge defendant with specific crimes. Accordingly, the trial court properly declined to suppress defendant's statement because defendant could not reasonably have understood the officers' statements as a promise of leniency. *Butler, supra* at 69.

Next, defendant contends that the trial court erred in denying his motion for a directed verdict on the ground that the prosecutor presented insufficient evidence to establish that the victim was mentally incapable. Again, we disagree. Viewed in a light most favorable to the prosecution, *People v Peebles*, 216 Mich App 661, 664; 550 NW2d 589 (1996), the evidence was sufficient to support a finding that the victim was "mentally incapable" as that term is defined by MCL 750.520a(f); MSA 28.788(1)(f).

Defendant also asserts that the trial court erred by failing to instruct the jury on the defense of consent. Because defendant failed to preserve this issue by objecting to the trial court's instructions, we will grant relief only if necessary to avoid manifest injustice. *People v Van Dorsten*, 441 Mich 540, 545; 494 NW2d 737 (1993). No manifest injustice will result from our failure to review because consent is not a defense to a prosecution for criminal sexual conduct premised on sexual activity with a mentally incapable person. *People v Khan*, 80 Mich App 605, 619 n 5; 264 NW2d 360 (1978).

Next, defendant argues that he was denied a fair trial by Dr. Michael Finn's testimony that the victim was "mentally incapable" as that term is defined by the criminal sexual conduct statutes. Absent

manifest injustice, we will not review this unpreserved challenge to the admission of evidence. *People v Burton*, 219 Mich App 278, 292; 556 NW2d 201 (1996). No manifest injustice will result from the failure to review in this case because expert opinion testimony will not be excluded simply because it embraces an ultimate issue to be decided by the trier of fact. MRE 704; *People v Ray*, 191 Mich App 706, 707; 479 NW2d 1 (1991).

Defendant further contends that he was denied a fair trial by the prosecutor's comment during her rebuttal argument that defendant forced the victim to have sex. Because defendant failed to preserve his challenge to the prosecutor's remarks, review will be undertaken only if the failure to review would result in a miscarriage of justice or a curative instruction could not have eliminated the prejudicial effect of the improper remarks. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). The failure to review this issue will not result in a miscarriage of justice because the prosecutor properly commented on the evidence and on issues raised by defense counsel. *People v Lee*, 212 Mich App 228, 255; 537 NW2d 233 (1995); *People v Vaughn*, 200 Mich App 32, 39; 504 NW2d 2 (1993). To the extent that the comments could be interpreted as injecting a different theory of culpability involving force or coercion, any prejudice could have been remedied by a curative instruction. *Stanaway, supra* at 687. Defendant's claim that the cumulative effect of the alleged errors denied him a fair trial is likewise without merit. *People v Kvam*, 160 Mich App 189, 201; 408 NW2d 71 (1987).

Next, defendant asserts that he was denied the effective assistance of counsel by trial counsel's failure to object to the jury instructions, the introduction of opinion testimony, and the prosecutor's rebuttal argument. Because defendant failed to preserve this issue by moving for an evidentiary hearing or new trial, review is foreclosed unless detail of the deficiency is apparent on the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). Defendant was not denied the effective assistance of counsel in this case because, as discussed above, his assertions of error have no merit and, thus, any objection would have been futile. *People v Daniel*, 207 Mich App 47, 59; 523 NW2d 830 (1994).

Defendant's remaining assertions of error involve his sentencing. First, defendant contends that the trial court erred by considering prior instances of criminal sexual penetration in assessing fifty points under offense variable (OV) 12. However, this alleged error involving a misinterpretation of the instructions regarding how the guidelines should be applied does not state a cognizable claim on appeal. *People v Mitchell*, 454 Mich 145, 177; 560 NW2d 600 (1997). In any event, this Court recently resolved a conflict among its prior decisions and held that prior instances of criminal sexual penetration may be considered when scoring OV 12. *People v Raby*, 218 Mich App 78; 554 NW2d 25 (1996).

Defendant further asserts that the seven to fifteen year sentence for the CSC-III convictions is disproportionate. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Because the sentence is within the guidelines' range, it is presumptively proportionate. *People v Piotrowski*, 211 Mich App 527, 532; 536 NW2d 293 (1995). Defendant has not presented mitigating circumstances that would overcome this presumption. *Id.* The sentence is proportionate to the seriousness of the circumstances surrounding the offense and the offender.

Finally, defendant contends that he is entitled to have inaccurate information stricken from his presentence report. We agree. The trial court erred in not striking information from the presentence investigation report that it deemed inaccurate or irrelevant. MCL 771.14(5); MSA 28.1144(5); *People v Martinez (After Remand)*, 210 Mich App 199, 202; 532 NW2d 863 (1995). However, under the circumstances of this case, the court's error is harmless because the court did not consider the information in fashioning defendant's sentence. *Martinez, supra* at 202. We nevertheless remand for the sentencing court to strike the inaccurate and irrelevant information and transmit a corrected copy of the report to the Department of Corrections. *Id.* at 203.

Affirmed. Remanded for preparation of an amended presentence investigation report.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Joseph B. Sullivan