STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHANNON KEITH FLANIGAN,

Defendant-Appellant.

UNPUBLISHED
December 16, 1997

No. 195621
Oakland Circuit Court
LC No. 95-138851-FC

Before: Smolenski, P.J., and MacKenzie and Neff, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(f); MSA 28.788(2)(1)(f) (actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration). Defendant was sentenced to eight to fifteen years' imprisonment. Defendant now appeals as of right. We affirm.

At trial, several witnesses testified to statements the complainant made concerning defendant's sexual assault. Defendant now argues on appeal that the trial court abused its discretion in admitting this hearsay evidence where it was offered only to impermissibly bolster the complainant's testimony. Defendant did object below to the testimony of one of these witnesses on the ground of hearsay. The trial court overruled defendant's objection on the ground that the testimony was admissible as an excited utterance. MRE 803(2). We find no abuse of discretion because the record indicates that the requirements for the admissibility of the complainant's statements as an excited utterance were met. *People v Jensen*, 222 Mich App 575, 582-583; 564 NW2d 192 (1997). Defendant failed to object to similar testimony offered by other witnesses. However, as noted by defendant in his brief on appeal and as made clear by the record, defendant's "theory in the trial court was that [the complainant] fabricated the entire sexual assault from the beginning" and that "once she told the lie, she had to keep lying to cover it up." Thus, it is apparent that defense counsel did not object below to the testimony defendant now challenges on appeal because this testimony fit the defense theory of the case. Defendant may not assign error on appeal to something that his own counsel deemed proper at trial. *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995).

Next, defendant contends that the trial court, in concluding that there was "a scintilla of evidence on each element," used the wrong legal standard in denying defendant's motion for a directed verdict. Defendant also contends that the evidence was insufficient to establish beyond a reasonable doubt that the complainant suffered personal injury and that defendant caused any personal injury suffered by the complainant.

For purposes of first-degree criminal sexual conduct, personal injury is defined to include bodily injury. MCL 750.520a(j); MSA 28.788(1)(j). The bodily injury necessary to sustain a conviction of first-degree criminal sexual assault need not be permanent or substantial. *People v Himmelein*, 177 Mich App 365, 377; 442 NW2d 667 (1989). In this case, evidence was presented that shortly after defendant's admitted digital penetration the complainant had a fresh vaginal abrasion caused by the penetration of a foreign object and that this abrasion was the type of injury typically incurred as a result of a sexual assault. In viewing this evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could have found beyond a reasonable doubt that defendant caused the complainant personal injury. *Himmelein*, *supra*. In light of this conclusion, we find that even if the trial court erroneously utilized the now-rejected "any evidence"[1] standard in evaluating defendant's motion for a directed verdict, the error was harmless.

Finally, defendant raises a claim of prosecutorial misconduct. However, defendant did not object below to the remarks he now challenges on appeal. Accordingly, appellate review is precluded unless an objection and timely instruction could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Because we conclude that a timely objection and a curative instruction could have cured any prejudicial effect of the prosecutor's remarks, and that defendant will not suffer a miscarriage of justice by our refusal to review the merits of his claim, we decline to address this issue.

Affirmed.

/s/ Michael R. Smolenski
/s/ Barbara B. MacKenzie
/s/ Janet T. Neff

[1] See *People v Herbert*, 444 Mich 466, 473; 511 NW2d 654 (1993).