

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JON ERIC JOHNSON,

Defendant-Appellant.

UNPUBLISHED

February 24, 1998

No. 196720

Midland Circuit Court

LC No. 95-007770-FC

Before: Markey, P.J., and Bandstra and Markman, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(a)(f); MSA 28.788(2)(1)(f), supplemented by a habitual offender third conviction, MCL 769.11(1)(b); MSA 28.1083(1)(b). His conviction stems from a sexual assault upon the girlfriend of an acquaintance following an all-night party that both attended. Defendant was sentenced to twenty-five to fifty years' imprisonment. Defendant appeals as of right. We affirm.

We initially address several issues raised by defendant on appeal that were not properly preserved by the raising of a timely and specific objection at trial. Accordingly, "unless the error could be decisive of the outcome," we will not consider it for the first time on appeal. *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994).

Defendant argues that the trial court erred when it allowed the emergency room physician who treated the female victim of the sexual assault to testify about what she had told the doctor about the assault. The doctor testified that the information he received from the victim about the events of the night of the assault was important to his diagnosis and treatment of the victim. MRE 803(4) specifically excludes from the rule against hearsay "[s]tatements made for purposes of medical treatment or medical diagnosis . . . describing . . . the inception or general character of the cause or external source thereof as reasonably necessary to such diagnosis and treatment."

We conclude that the doctor's testimony about the immediate circumstances surrounding the assault falls clearly within the scope of this exception to the hearsay rule under MRE 803(4). See *People v Crump*, 216 Mich App 210, 212; 549 NW2d 36 (1995). The record indicates that in

addition to this testimony, however, the doctor also testified about what the victim had told him about the events of the evening prior to the assault. When the victim arrived at the party and what transpired between her and defendant at a gas station and in the car prior to the assault are irrelevant to her medical diagnosis and treatment. This testimony, in our judgment, is not covered by the MRE 803(4) hearsay exception. Nevertheless, because this testimony was not in and of itself incriminating (and merely described encounters between defendant and the victim prior to the actual assault), and given the weight of the other evidence against defendant, we conclude that the admission of this testimony was not decisive of the outcome.¹

We also reject defendant's claim that the doctor was erroneously allowed to testify about whether the victim was sexually assaulted. Given that the doctor's testimony on this issue was based on an objective physical examination of the victim and given that defendant himself injected the issue of consent into the trial, we conclude that the doctor's testimony was properly admitted. See *People v Smith*, 425 Mich 98, 115; 387 NW2d 814 (1986) ("The use of force or coercion is relevant in this case in light of defendant's claim that the acts were consensual; therefore, the expert's opinion on forcible penetration was proper so long as it was based upon a proper factual foundation.").

Defendant next argues that DNA evidence linking defendant to an alleged assault on another woman was improper propensity evidence that should have been excluded. Prior to trial, the court ruled that the prosecution would be able to present the testimony of two other woman who had claimed to have been sexually assaulted by defendant. The trial court ruled that such testimony was admissible under MRE 404(b) because it tended to establish that defendant operated according to a common scheme or plan. Defendant does not challenge the validity of this ruling.

In *People v Hoffman*, 225 Mich App 97, 99; 570 NW2d 146 (1997), we observed that other acts evidence is admissible if it is "(1) offered for a proper purpose . . . , (2) relevant . . . , and (3) sufficiently probative to prevail under the balancing test of MRE 403." We conclude that each of these criteria were satisfied with regard to the challenged DNA evidence. In *Huddleston v United States*, 485 US 686, 689; 108 S Ct 1496; 99 L Ed 2d 771 (1988),² the United States Supreme Court observed that "similar acts evidence is relevant only if the jury can reasonably conclude that the act occurred and that defendant was the actor." The DNA evidence at issue tended to establish that the other assault had taken place, and that defendant was the perpetrator. Further, the method of DNA analysis employed was the PCR method, the reliability of which we have acknowledged in *People v Lee*, 212 Mich App 228, 282-283; 537 NW2d 233 (1995). Because this relevant and probative evidence supports the unchallenged testimony of one of the two prior assault victims, we conclude that it was advanced for a proper purpose and was not erroneously admitted. See *VanderVliet, supra* at 64 (observing that "if the proffered other acts evidence is logically relevant, and does not involve the intermediate inference of character, Rule 404(b) is not implicated.").

On a related matter, defendant alleges that defense counsel's failure to object to the admission of the DNA evidence amounted to ineffective assistance of counsel. Because we have concluded that the admission of that evidence was not erroneous, we conclude that counsel's failure to object to its admission evidences neither a level of "performance . . . below an objective standard of reasonableness," *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), nor does it raise

“a reasonable probability that . . . the result of the proceeding would have been different” had counsel raised this baseless objection. *Id.* at 687-688.

Defendant also argues that testimony by the victim’s registered psychiatric social worker was erroneously admitted because it did not satisfy the criteria for expert testimony. Defendant contends that the social worker should not have been allowed to testify about the victim’s psychiatric condition both before and after the rape, or the victim’s course of medication. Defendant failed to raise a timely and specific objection to the former testimony but did raise a timely and specific objection to the latter testimony.

In *People v Williams (After Remand)*, 198 Mich App 537, 541; 499 NW2d 404 (1993), we found that under MRE 702, admissibility of expert testimony “is governed by a three-part test: (1) the expert must be qualified; (2) the evidence must serve to give the trier of fact a better understanding of the evidence or assist in determining a fact in issue; and (3) the evidence must be from a recognized discipline.” We conclude that the record establishes that the witness was qualified as an expert by virtue of her education, training and experience (both general and specific to the victim) in a recognized discipline. MRE 702. Thus, prongs (1) and (3) of the above test are satisfied. The resolution of this issue, therefore, rests on whether the preserved and unpreserved testimony gave “the trier of fact a better understanding of the evidence or assist[ed] in determining a fact in issue.”

Looking first to the testimony about the victim’s psychiatric condition (to which no objection was made), we conclude that this testimony assisted the trier of fact in determining whether the distress, pain or suffering the victim experienced after the assault was extreme enough to qualify as mental anguish. CJI 2d 20.9(2). The prosecution argued, and the trial court instructed the jury, that the personal injury element of criminal sexual conduct in the first-degree can be satisfied by a finding that the victim suffered mental anguish. CJI 20.1, 20.9(1), (2). Therefore, admission of this testimony was proper. As for the testimony about the victim’s medication (to which objection was made), we note that the substance of the witness’ testimony was that the victim’s altered psychological condition after the assault was not caused by any change in medication, as was implied by defendant during cross-examination of the witness. We believe this knowledge was within the witness’ level of expertise, acquired through her continuing work with the victim. Given defendant’s exploration of this issue on cross-examination and given the limited nature of the challenged testimony, we reject defendant’s suggestion that the admission of that testimony evidences an abuse of discretion.

Next, defendant argues that the prosecutor made improper remarks during his closing and rebuttal closing arguments. Specifically, defendant alleges that the prosecutor: (1) vouched for the credibility of a prosecution witness; (2) suggested that the prosecutor had some special knowledge concerning that witness’ credibility; (3) stated that he believed personally in defendant’s guilt; (4) stated that the people’s case was “unrebutted”; and (5) placed the prestige of his office in issue by suggesting that charges would not have been brought if not true. Defendant failed to preserve this issue as well by making timely and specific objections to the alleged improper remarks. MRE 103(a)(1). Appellate review of this issue is therefore precluded unless we determine that “a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice.” *Stanaway, supra* at 687.

We note that defendant failed to specifically cite to those positions of the prosecutor's closing arguments that defendant finds objectionable. Reading the prosecutor's arguments as a whole, *People v Gonzales*, 178 Mich App 526, 535; 444 NW2d 228 (1989), we are unable to uncover any instance where the prosecutor was not simply "argu[ing] the evidence and all reasonable inferences" therefrom. *Id.*

Finally, defendant raises a three-pronged attack to the validity of the sentence imposed by the trial court. First, defendant argues that the trial court failed to consider the appropriate sentencing factor and standards, as well as failing to articulate objective reasons in support of the imposed sentence. Second, defendant argues that the trial court improperly made an independent finding of guilt on a separate unproved assault charge. Third, defendant argues that the sentence violates the principle of proportionality. Our review of a sentence imposed under an habitual offender statute is reviewed for an abuse of discretion. *People v Cervantes*, 448 Mich 620, 627; 532 NW2d 831 (1995).

Contrary to defendant's assertion, we observe that the trial court did consider the appropriate sentencing factors and standards when imposing sentence. For example, the trial court did address and consider all four of the goals of punishment outlined by the Michigan Supreme Court in *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972). Further, the record indicates that the trial court properly considered the severity and nature of the crime, see *People v Hunter* 176 Mich App 319, 321; 439 NW2d 344 (1989), as well as defendant's previous criminal history. *Id.* at 321. The record also does not support defendant's assertion that the trial court made an independent finding of guilt on a separate assault charge. Rather, the record indicates that the judge's focus was on defendant's prior criminal history, including a conviction in Missouri for assault with intent to commit first-degree sexual abuse. We also reject defendant's contention that his sentence was disproportionate. As a third time offender, it was within the trial court's discretion to sentence defendant "to imprisonment for life or a lesser term." MCL 769.11; MSA 28.1083(a). Looking to all the circumstances surrounding this offense and this offender, *People v Milbourn*, 435 Mich 630, 636; 462 NW2d 1 (1990), we conclude that the record supports the severity of the sentence imposed. Defendant's behavior evidences an inability to conform his behavior to the dictates of society. Accordingly, we believe that the trial court did not abuse its discretion when imposing sentence. See *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997) ("We believe that a trial court does not abuse its discretion in giving a sentence within the statutory limits established by the Legislature when an habitual offender's underlying felony, in the context of his previous felonies, evidences that the defendant has an inability to conform his conduct to the laws of society.").

Affirmed.

/s/ Jane E. Markey

/s/ Richard A. Bandstra

/s/ Stephen J. Markman

¹ While the testimony of the doctor which was outside the MRE 803(4) exception did tend to support the victim's trial testimony and this give credence to her account of events on the day of the assault, we

believe that defendant's credibility was vastly more undermined by his conflicting testimony concerning whether he had ever had sexual intercourse with the victim. Further, this case involved more than just a credibility battle between defendant and the victim. The doctor testified at some length about the physical evidence supporting the finding of rape and substantial DNA evidence showed that defendant had ejaculated in and on the victim. In addition, there was the 404(b) testimony of two prior victims and testimony concerning the victim's altered psychological state following the rape.

² The test we articulated in *Hoffman, supra*, was based on criteria set forth in *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), which in turn were explicitly adopted from the *Huddleston* decision. *VanderVliet, supra* at 74.