STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES ROOSEVELT BURSTON,

Defendant-Appellant.

UNPUBLISHED
March 17, 1998

No. 197495
Washtenaw Circuit Court
LC No. 95-004449 FC

Before: McDonald, P.J., and O'Connell and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of one count of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), and two counts of third-degree criminal sexual conduct, MCL 750.520d; MSA 28.788(4). By virtue of his status as a fourth-offense habitual offender, defendant was sentenced to enhanced concurrent terms of twenty to forty years' imprisonment for the first-degree criminal sexual conduct conviction and ten to forty years' imprisonment for each third-degree criminal sexual conviction. Defendant appeals as of right. We affirm defendant's convictions and sentences but remand for correction of the judgment of sentence.

The complainant was found by the trial court to be unavailable to testify. Therefore, her preliminary examination testimony was read at trial. At the preliminary examination, the complainant testified that in the early morning hours of June 4, 1995, defendant and another man waited for the complainant outside her place of employment. The two men began walking with her as she left work and pulled her into a dark driveway where defendant penetrated her twice. Defendant told her he would drive her home, but stopped the car twice, each time penetrating her. Defendant admitted having sexual intercourse with the complainant, but testified that she had consented.

Defendant first argues that the trial court erred in finding the complainant "unavailable" to testify at trial and in allowing her preliminary examination testimony to be read to the jury. Defendant contends that the trial court should have found the complainant in contempt of court for refusing to testify.

The following out-of-court statements are not excluded by the hearsay rule if the declarant is unavailable as a witness:

> Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. [MRE 804(b)(1).]

See also MCL 768.26; MSA 28.1049.

One of the situations in which a witness is deemed unavailable is when the declarant "persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so." MRE 804(a)(2). A witness' adamant refusal to testify justifies a trial court's determination that the witness is unavailable and that the witness' preliminary examination testimony may, therefore, be admitted at trial. *People v Burgess*, 96 Mich App 390, 401; 292 NW2d 209 (1980). Because a finding that the witness persists in refusing to testify is a finding of fact, this Court will not set it aside absent clear error. *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995). Because the trial court has the discretion to admit evidence, we review its ruling on admissibility for an abuse of discretion. *Id*.

In this case, the prosecutor informed the court before jury selection that the complainant was refusing to testify. The court and the attorneys questioned the complainant, and she indicated that she would not testify, stating that it was just "too hard." She also testified that she was fearful to testify, that it was "too stressful," and that although she had testified at the preliminary examination, "it took [her] a long time to get over that and [she couldn't] do it again." The attorney appointed to represent the complainant on this matter stated that "this is not a situation where we have a willful person who is simply disregarding the orders of the Court. This is a situation where she is, I believe, paralyzed." The record reveals that complainant's refusal to testify was adamant. The trial court was not obligated to cite her with contempt charges. *Burgess, supra*. We conclude that the trial court's finding that the complainant persisted in refusing to testify despite the court's order to do so was not clearly erroneous. *Briseno, supra*. Review of the record also reveals that defendant had an opportunity and similar motive to develop the complainant's preliminary examination testimony. *People v Szeles*, 18 Mich App 575, 577; 171 NW2d 550 (1969). Therefore, we conclude that the trial court did not abuse its discretion in admitting this testimony.

Next, defendant contends that the trial court abused its discretion in imposing his sentence, and that the sentence was disproportionate.

We review an habitual offender's sentences to determine whether there has been an abuse of discretion. *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997). "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." *Id*. Accordingly, we find no abuse of sentencing discretion in this case.

Finally, although not raised by either party, the judgment of sentence erroneously indicates that defendant was convicted of three counts of first-degree criminal sexual conduct. Accordingly, we

remand for the purely administrative task of correcting the judgment of sentence. The trial court shall ensure that the corrected judgment of sentence is transmitted to the Department of Corrections.

Affirmed and remanded. We do not retain jurisdiction.

/s/ Gary R. McDonald
/s/ Peter D. O'Connell
/s/ Michael R. Smolenski