STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TOMMIE BRUTON,

Defendant-Appellant.

UNPUBLISHED
March 17, 1998

No. 199368
Oakland Circuit Court
LC No. 96-144253 FH

Before: Gribbs, P.J., and Cavanagh and Saad, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree criminal sexual conduct (CSC), MCL 750.520c(1)(f); MSA 28.788(3)(1)(f). The trial court sentenced defendant to a term of three to fifteen years' imprisonment. Defendant now appeals as of right. We affirm.

I

Defendant claims that he is entitled to a new trial because the trial court gave coercive and improper jury instructions in response to the jury's declaration that it was deadlocked. Because defendant did not object to the trial court's instruction below, this issue is not preserved for appellate review. See *People v Pollick*, 448 Mich 376, 386-387; 531 NW2d 159 (1995). However, considering the instructions in their entirety, we find no indication that the instructions were unduly coercive or that the jury was embarrassed or pressured into reaching a verdict. The jury was not required to deliberate for an unreasonable length of time, and the court repeatedly stated that the jurors were not to surrender their own opinions in order to reach a unanimous verdict. See *id*. at 383-385; *People v Holmes*, 132 Mich App 730, 749; 349 NW2d 230 (1984).

II

Defendant next claims that the trial court improperly instructed the jury on the charges against him after the jury asked for clarification. Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. Even if somewhat imperfect, there is no error if the instructions

fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995).

Defendant does not challenge the trial court's recitation of the elements of the offenses; rather, he contends that additional comments made by the court constituted a mischaracterization of defendant's testimony. We disagree. Pursuant to MCL 768.29; MSA 28.1052, the trial court "shall instruct the jury as to the law applicable to the case and in his charge make such comment on the evidence, the testimony and character of any witnesses, as in his opinion the interest of justice may require." The trial court noted that defendant's and the complainant's accounts of the incident were conflicting; this conclusion is apparent from a cursory review of the testimony. The court then stated that if the jury believed defendant, it should acquit him. If the jury believed the complainant, it should determine whether the elements of the charged offenses had been established. See *People v Torres (On Remand)*, 222 Mich App 411, 420; 564 NW2d 149 (1997). We find no error requiring reversal. The court's instructions sufficiently protected defendant's rights and fairly presented the issues to be tried to the jury. See *Bell*, *supra*.

III

Defendant argues that the trial court erred in denying his motion for directed verdict because there was insufficient evidence of assault with intent to commit criminal sexual conduct involving penetration to warrant submission of the charge to the jury. To review a trial court's ruling with regard to a motion for a directed verdict, this Court considers the evidence presented in the light most favorable to the prosecution to determine whether a rational factfinder could find that the essential elements of the charged crimes were proved beyond a reasonable doubt. *People v Davis*, 216 Mich App 47, 52-53; 549 NW2d 1 (1996).

The elements of assault with intent to commit CSC are as follows: (1) an assault; (2) the defendant must have intended to do the act for the purpose of sexual arousal or sexual gratification; (3) the defendant must specifically have intended to touch the complainant's genital area, groin, inner thigh, buttock, breast, or clothing covering such areas, or the defendant must have specifically intended to have the complainant touch such area on him; and (4) aggravating circumstances, such as the use of force or coercion. *People v Lasky*, 157 Mich App 265, 269-270; 403 NW2d 117 (1987).

Defendant contends that the prosecution failed to establish evidence of his intent to commit sexual penetration because the complainant's testimony only established his desire to view her vagina. Viewing the evidence in the light most favorable to the prosecution, we disagree. The complainant testified that during a protracted struggle, defendant attempted to get on top of her and made several attempts to pry open her legs after he had ripped off her underwear. The complainant stated that, based on her prior relationship with defendant, she knew that defendant intended to penetrate her, and would have done so if he had succeeded in opening her legs. Finally, the complainant testified that defendant had removed his underwear and that he had an erection. Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of a crime. *People v McKenzie*, 206 Mich App 425, 428; 522 NW2d 661 (1994). We conclude that the evidence was

sufficient to support the submission of the charge of assault with intent to commit sexual conduct involving penetration to the jury.

IV

Next, defendant asserts that the trial court erred in denying his request for an instruction on the cognate lesser included offense of assault and battery. A cognate lesser offense is one which shares some common elements with and is of the same class as the greater offense, but also has elements not found in the greater. *People v Hendricks*, 446 Mich 435, 443; 521 NW 2d 546 (1994). If the defendant requests an instruction regarding a cognate lesser offense and the evidence supports it, the trial court must give the instruction. *People v Veling*, 443 Mich 23, 36; 504 NW 2d 456 (1993).

In order for an instruction on a cognate offense to be proper, the greater offense and the cognate offense must protect the same societal interests. *Hendricks*, *supra* at 447. Our Legislature enacted the criminal sexual conduct statutes to strengthen laws prohibiting particular kinds of sexual conduct. On the other hand, assault statutes deal only with general contacts among individuals and preserve safety and security by protecting people against corporal harm. *People v Corbiere*, 220 Mich App 260, 264; 559 NW2d 666 (1996). Recognizing this disparity in statutory focus, this Court has repeatedly held that criminal sexual conduct and assault statutes were enacted to protect distinct Legislative interests. *Id*. at 264-265. Accordingly, we conclude that the trial court did not err in refusing defendant's request for an instruction on simple assault and battery.

V

Defendant next argues that the trial court erred in finding that statements made by the complainant to a neighbor were admissible under the excited utterance exception to the hearsay rule. The admission of hearsay testimony under the excited utterance exception is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Kowalak (On Remand)*, 215 Mich App 554, 558; 546 NW2d 681 (1996).

In order for a statement to be admitted into evidence as an excited utterance, three criteria must be satisfied: (1) the statement must arise out of a startling event; (2) the statement must be made before there has been time for contrivance or misrepresentation by the declarant; and (3) the statement must relate to the circumstances of the startling event. *People v Straight*, 430 Mich 418, 424; 424 NW2d 257 (1988).

Defendant contends that because the interim between the incident and the conversation with the neighbor was at least two hours and the complainant had time to compose herself, the trial court erred in admitting the statements under the excited utterance exception to the hearsay rule. However, the rationale for the excited utterance exception is not that the declarant did not have time to fabricate, but rather that the declarant did not have the *capacity* to fabricate. *Id*. at 425. A trial court may consider all the relevant circumstances bearing on spontaneity and lack of deliberation in determining whether a declaration comes within the excited utterance exception. There is no definite and fixed limit of time in determining whether a declaration comes within the excited utterance exception. *Kowalak*, *supra* at 559.

In the present case, the neighbor testified that the complainant was "very upset," "shaking," and "kind of stuttering." The neighbor further stated that this was not the complainant's customary demeanor. Based on this testimony, we cannot find that the trial court abused its discretion in concluding that the complainant had been speaking under the influence of an overwhelming emotional condition and had not had the capacity to fabricate.

VI

Finally, defendant claims that he is entitled to resentencing because the trial court erred in scoring his prior misdemeanor trespass conviction as a burglary. However, a putative error in the scoring of sentencing guidelines is not a basis upon which an appellate court can grant relief. *People v Polus*, ___ Mich ___, ___; ___ NW2d ___ (Docket No. 108010, issued 2/5/98), slip op pp 12-13; *People v Mitchell*, 454 Mich 145, 175-178; 560 NW2d 600 (1997). Where, as here, the sentence is not disproportionate, there is no basis for relief on appeal. See *Polus*, *supra* at 10.

Affirmed.

/s/ Roman S. Gribbs
/s/ Mark J. Cavanagh
/s/ Henry William Saad