

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK ALLEN GREGG,

Defendant-Appellant.

UNPUBLISHED
October 26, 1999

No. 211564
Dickinson Circuit Court
LC No. 97-002108 FC

Before: Griffin, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of third-degree criminal sexual conduct, MCL 750.520d; MSA 28.788(4). He was sentenced to 2-1/2 to 15 years' imprisonment. Defendant now appeals as of right. We affirm.

Defendant first claims that the evidence was insufficient to support his conviction of third-degree CSC. In reviewing the sufficiency of the evidence in a criminal case, this Court is required to view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Medlyn*, 215 Mich App 338, 340; 544 NW2d 759 (1996). A person is guilty of third-degree CSC if he engages in sexual penetration with another person and force or coercion is used to accomplish the sexual penetration. MCL 750.520(1)(b); MSA 28.788(4)(1)(b). The term "force" includes the exertion of strength or power on another person, *People v Premo*, 213 Mich App 406, 409; 540 NW2d 715 (1995), and a determination whether force was used must be determined in light of all the circumstances. *People v Brown*, 197 Mich App 448, 450; 495 NW2d 812 (1992).

In this case, the victim unequivocally testified that defendant pushed her onto a bed, removed her tennis shoes and pants, climbed on top of her, pinned her down, and "very forceful[ly]" inserted his penis into her vagina. When the victim screamed, defendant slapped her in the face and then put his hand over her mouth to muffle her screams. The victim testified that she "[a]bsolutely" did not consent to the act. After defendant ejaculated into the victim's vagina, he went into the bathroom and returned with a wet towel. He then "rammed" the towel up inside the victim's vagina in an attempt to wipe away

any evidence of the crime. Defendant told the victim that it would be her word against his and that no one would believe her.

Other evidence presented at trial, including medical testimony, corroborated the victim's claim that she had been raped. Defendant, however, denied forcing the victim to engage in sexual intercourse. Instead, he claimed that the victim initiated the contact and consented to it. The question, then, was one of credibility and credibility is a matter for the trier of fact to ascertain. *People v Jackson*, 178 Mich App 62, 65; 443 NW2d 423 (1980).

In sum, when viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that defendant forced the victim to engage in sexual intercourse. See *People v Vaughn*, 186 Mich App 376, 379-381; 465 NW2d 365 (1990). Indeed, the victim's testimony that defendant forced her to engage in sexual intercourse was, by itself, sufficient proof on the elements of the crime. *People v Reid*, 233 Mich App 457, 470-473; 592 NW2d 767 (1999). Hence, defendant's argument that the evidence was insufficient to support his conviction must fail.

It is also apparent that the verdict was not against the great weight of the evidence. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). To the extent defendant argues, as he did below, that the trial court, sitting as the thirteenth juror, should have granted a new trial on the basis of its view of the weight of the evidence, we note that the thirteenth juror standard set out in *People v Herbert*, 444 Mich 466; 511 NW2d 654 (1993), was rejected in *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998).

Next, defendant claims that Dr. Hallfrisch's opinion that the victim had been raped was inadmissible because the opinion was based on the victim's emotional state rather than the physical findings he made during his examination of the victim. In support of defendant's position, he cites two decisions of this Court, *People v Hubbard*, 159 Mich App 321, 326-327; 406 NW2d 287 (1987) and *People v Naugle*, 152 Mich App 227, 236-237; 393 NW2d 592 (1986). Neither case supports defendant's position. Instead, both cases simply cite the general rule that "[t]he examining physician in a criminal sexual conduct case is a proper witness as long as his or her testimony may assist the jurors in their determination of the existence of either of two crucial elements of the crime charged, (1) penetration itself and (2) penetration against the will of the victim." *Hubbard, supra* at 326-327; *Naugle, supra* at 236.

Here, as defendant acknowledges, the crucial issue at trial was whether he forced the victim to engage in sexual intercourse. Dr. Hallfrisch's testimony that the victim had bruises and abrasions on her arm, that those bruises were "consistent with being held" down, that it appeared that the victim had attempted to resist her attacker, that there was semen in the victim's vagina, and that it was his opinion that the victim had been raped constituted evidence that was potentially helpful to the jury in determining whether the victim was forced to engage in sexual intercourse with defendant. Therefore, the testimony was admissible under the rule set forth in *Hubbard, supra* at 326-327, and *Naugle, supra* at 236. Moreover, it is well settled that an expert's opinion testimony will not be excluded simply because it embraces the ultimate issue to be decided by the trier of fact. MRE 704; *People v Smith*, 425 Mich

98, 105; 387 NW2d 814 (1986); *People v Ray*, 191 Mich App 706, 707; 479 NW2d 1 (1991). Dr. Hallfrisch's opinion that the victim had been forced to engage in sexual intercourse was relevant in light of defendant's claim that the sex act was consensual. MRE 401.

It is also clear from a review of his testimony that Dr. Hallfrisch's conclusions were not based only on the victim's emotional state but also on his physical examination of the victim. Therefore, there was a proper foundation for the evidence.

Lastly, we reject defendant's claim that the prosecutor engaged in misconduct by asking defendant if he ever had a physical confrontation with his ex-wife. The prosecutor's question was in direct response to, and an attempt to rebut, testimony elicited from defense witnesses on direct examination to the effect that defendant was a nonviolent person. "Once a defendant has placed his character in issue, it is proper for the prosecution to introduce evidence that the defendant's character is not as impeccable as is claimed." *People v Leonard*, 224 Mich App 569, 594; 569 NW2d 663 (1997). See also *People v Vasher*, 449 Mich 494, 503; 537 NW2d 168 (1995). Here, defendant attempted to establish through defense witnesses that he was a nonviolent person. The prosecutor was entitled to rebut that claim. Therefore, the prosecutor's question regarding whether defendant ever had a physical confrontation with his ex-wife does not require reversal.

Affirmed.

/s/ Richard Allen Griffin
/s/ David H. Sawyer
/s/ Michael R. Smolenski