

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD ALLEN SOUSA,

Defendant-Appellant.

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UNPUBLISHED

January 27, 2004

No. 244554

Tuscola Circuit Court

LC No. 02-008333-FC

Before: Smolenski, P.J., and Saad and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(g) (sexual penetration of vulnerable victim, causing mental anguish), for which he was sentenced as a second-habitual offender, MCL 769.10, to 12 to 15 years' imprisonment. We affirm.

First, defendant argues there was insufficient evidence to sustain his conviction. We disagree. When reviewing a claim for sufficiency of the evidence, this Court must consider the evidence, both direct and circumstantial, in the light most favorable to the prosecution, and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hardiman*, 466 Mich 417, 421, 428; 646 NW2d 158 (2002). It is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *Id.* at 428.

The prosecutor's theory of the case was that the victim suffered a personal injury, as the applicable statute requires, through mental anguish. MCL 750.520b(1)(g); MCL 750.520a(1). Defendant asserts there was insufficient evidence to establish that the victim suffered mental anguish. There is no statutory definition of mental anguish, but in *People v Petrella*, 424 Mich 221, 227; 380 NW2d 11 (1985), our Supreme Court defined the term as "extreme or excruciating pain, distress, or suffering of the mind."

The *Petrella* Court's analysis is instructive. This Court should consider the following factors in determining whether the evidence established that the victim suffered mental anguish:

- (1) Testimony that the victim was upset, crying, sobbing, or hysterical during or after the assault.

- (2) The need by the victim for psychiatric or psychological care or treatment.
- (3) Some interference with the victim's ability to conduct a normal life, such as absence from the workplace.
- (4) Fear for the victim's life or safety, or that of those near to her.
- (5) Feelings of anger and humiliation by the victim.
- (6) Evidence that the victim was prescribed some sort of medication to treat her anxiety, insomnia, or other symptoms.
- (7) Evidence that the emotional or psychological effects of the assault were long-lasting.
- (8) A lingering fear, anxiety, or apprehension about being in vulnerable situations in which the victim may be subject to another attack. [*Id.* at 270-271.]

The Supreme Court cautioned that this list was not exhaustive and “that each case must be decided on its own facts, and that no single factor listed below should be seen as necessary to a finding of mental anguish.” *Id.* at 270.

In *Petrella*, the victim

testified that she was fearful during the assault, and that afterwards she was very upset, frightened, and was crying. Her friend testified that when the complainant phoned her, she was screaming and her voice was hysterical, such that the friend did not initially recognize it. When her friend arrived at the complainant's apartment, the complainant was very upset and crying, and was frightened and uncomfortable when taken to the gas station to identify the defendant. The complainant's friend also testified that the complainant was not a person who cried easily. The complainant further testified that she had trouble sleeping after the incident, and continued to experience insomnia at the time of the trial. She missed three days from work immediately after the incident, and then periodically missed work from time to time due to the assault. She never again stayed in that apartment after the assault occurred. The officers who responded to complainant's call testified that she was wringing her hands, was very agitated, very upset, and very, very nervous. [*Id.* at 271.]

On these facts, the *Petrella* Court held “that the prosecution proved, beyond a reasonable doubt, that the victim suffered severe emotional and psychological consequences following the assault, resulting in a major disruption, or crisis, in her life.” *Id.* at 272.

In this case, the victim testified she became physically sick after the defendant assaulted her. The victim's mother testified that her daughter was “very depressed, very withdrawn,” refused to sleep in her bedroom, sought mental health therapy, and that her school performance had suffered. Also, at the time of the trial, the victim continued to suffer physical effects of the trauma, such as an irregular menstrual cycle and hives. The traumatic effects of the assault

suffered by the victim clearly constituted “a major disruption, or crisis, in her life.” *Id.* Thus, viewed in a light most favorable to the prosecution, we find the evidence was sufficient to establish the victim’s mental anguish beyond a reasonable doubt and sustain his conviction.

Second, defendant argues that the trial court abused its discretion when it allowed the prosecutor to present evidence of prior acts under MRE 404(b). To warrant reversal of a preserved, non-constitutional issue, the burden is on the defendant to show that “it is more probable than not that a different outcome would have resulted without the error.” *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 673 (1998). But defendant’s argument does not specifically address prejudice. Rather, it appears that he assumes that improperly admitted prior acts evidence is per se unfairly prejudicial. However, this Court recently held that we must determine whether the challenged evidence was prejudicial when viewing the evidence as a whole in a light most favorable to the prosecution. *People v Knox*, 256 Mich App 175, 195; 662 NW2d 482 (2003), lv pending.

Here, we simply cannot conclude that the outcome would have been different had the prior acts evidence not been admitted. The only evidence that contradicted the victim’s account of the incident was defendant’s own statement that he did not “touch” the victim. It is undisputed that defendant was in the house at the time and that he was intoxicated. And both the victim and defendant’s niece, who was in the room at the time of the incident, positively identified defendant as the attacker. Therefore, reversal is not warranted on this issue.

Third, defendant argues that the prosecutor’s statements during closing argument and rebuttal deprived him of a fair trial. We disagree. Defendant concedes that he did not object to these statement below and that the issue is therefore unpreserved. As a result, defendant must establish plain error that affected his substantial rights in order to avoid forfeiture. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

We find that there was no error. “A prosecutor may argue from the facts that a witness, including the defendant, is not worthy of belief.” *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). And the prosecutor “may draw inferences for the jury from the facts of the case.” *People v Viane*, 119 Mich App 690, 697; 326 NW2d 607 (1982). The prosecutor’s challenged comments referenced evidence or suggested inferences that the jury could derive from the evidence. When the prosecutor mentioned the credibility of a witness, he did so in the context of the evidence. He did not vouch for a specific witness’ credibility or suggest that he had any special knowledge of the case. Therefore, we find that the prosecutor’s statements were permissible comments on the evidence.

Finally, defendant argues that the trial court improperly scored offense variable (OV) 4 and offense variable (OV) 10 when calculating his sentence. We disagree. This Court reviews sentencing decisions under the statutory guidelines for an abuse of discretion and will uphold a sentencing court’s scoring decision if there is any evidence supporting it. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Defendant argues that no points should have been scored for OV 4 (serious psychological injury to the victim) because the victim sought therapy to resolve her issues associated with testifying in court, not to cope with her victimization. But defendant ignores the victim’s testimony that she had been in therapy to deal with the effects of the assault and only began more

frequent sessions near the time of the trial to cope with the stressors of the trial. Also, there is evidence on the record indicating that the victim suffered emotional trauma as a direct result of the assault. Thus, the trial court did not abuse its discretion when it scored OV 4 at ten points because there was evidence that defendant inflicted a serious psychological injury on the victim.

Defendant next argues that OV 10 (exploitation of a vulnerable victim) should have been scored five points instead of fifteen because there was no evidence of predatory conduct. Predatory conduct is defined as “preoffense conduct directed at a victim for the primary purpose of victimization.” MCL 777.40(3)(a). At trial, defendant testified that when he saw the victim on the night of the incident, “she looked all right,” and he remembered what the victim was wearing. He also testified that he played “quarters,” a drinking game, with her that night. The trial court concluded from this evidence that defendant singled out the thirteen-year-old victim, helped get her drunk, and then took advantage of her helplessness. We find that the trial court did not abuse its discretion in concluding that this evidence established predatory conduct warranting OV 10 to be scored at fifteen points.

Affirmed.

/s/ Michael R. Smolenski

/s/ Henry William Saad

/s/ Kirsten Frank Kelly