

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK STEVEN BROWN,

Defendant-Appellant.

UNPUBLISHED

March 22, 2007

No. 265955

Kent Circuit Court

LC No. 04-009516-FC

Before: O’Connell, P.J., and Murray and Davis, JJ.

PER CURIAM.

Following a jury trial, defendant Mark Brown was convicted of one count of first-degree criminal sexual conduct (CSC-I) (sexual penetration occurring during the commission of a felony), MCL 750.520b(1)(c), one count of CSC-I (sexual penetration by an actor armed with a weapon), MCL 750.520b(1)(e), and one count of first-degree home invasion, MCL 750.110a(2). The trial court sentenced defendant to life in prison for his CSC-I (during felony) conviction, 40 to 80 years’ imprisonment for his CSC-I (weapon used) conviction, and 10 to 20 years’ imprisonment for his first-degree home invasion conviction. We affirm defendant’s convictions and sentences.

I. Facts and Proceedings

Defendant was charged in connection with an incident that occurred on October 24, 1995. The victim testified that a male knocked on her door at approximately 3:00 a.m. When she opened the door to see who was there, the male forced his way into her apartment, dragged the victim into the kitchen, and grabbed a knife. He then pushed the victim to the floor and choked her. The assailant then dragged her to the bedroom, where he removed her underwear and ordered her to remove her nightgown. He penetrated her vagina with his penis and the handle of a broom, attempted to penetrate her anally with his penis, to penetrate her vagina with a marking pen, and forced his penis into her mouth. During the sexual assault, the assailant brandished a pair of scissors that he found in the victim’s bedroom. After sexually assaulting the victim, the male asked her for money, forced her to take a shower, bound her arms and legs with an extension cord and shoved her underwear in her mouth. He then left the apartment, taking a VCR that belonged to the victim. The incident lasted approximately three hours.

At trial, the prosecutor introduced evidence that defendant's DNA profile was consistent with DNA found on the victim's underwear. Testimony indicated that the chance the DNA profile would match another male was 1 in 1.1 quadrillion.

Defendant presented testimony that he was incarcerated on October 24, 1995. However, conflicting evidence indicated that defendant was released from jail two months before this incident occurred. Defendant's father testified that defendant sustained a gunshot wound to his hand in 1993 and, as a result of his injury, he would have been unable to drag a person through an apartment. The police obtained surveillance footage from the apartment complex where the victim resided, which depicted a male walking alone in the apartment complex at 3:09 a.m. on the day of the incident. A desk clerk from the apartment complex identified the male in the surveillance video with "one hundred percent" certainty as someone other than defendant. The jury found defendant guilty of two counts of CSC-I and one count of first-degree home invasion.

At sentencing, the trial court sentenced defendant to life in prison for his CSC-I (during felony) conviction and to 40 to 80 years in prison for his CSC-I (weapon used) conviction. The trial court also sentenced defendant to 10 to 20 years in prison for his first-degree home invasion conviction and ordered defendant to serve that sentence consecutively to the CSC sentences. The trial court explained:

It seems to me, Mr. Brown, that by your actions in the cases before the Court and by your extensive criminal history, you have manifestly demonstrated yourself to be a dangerous individual, highly assaultive and very likely to re-offend if given the opportunity to do so. I believe your sentence must be crafted in such a way as to provide maximum protection for the public from your predatory conduct. I believe there also is a necessity for you to be confined for a very long period of time both as a deterrent and as a form of incapacitation during any rehabilitative efforts that may be engaged in in [sic] your behalf. Finally, given the magnitude of these offenses, the rule or [sic] proportionality dictates that a very substantial sentence be imposed.

II. Analysis

Defendant first contends that his trial counsel was ineffective for failing to object to the admission of the DNA evidence because the prosecutor failed to establish a proper chain of custody. Because defendant failed to move for a new trial or for an evidentiary hearing under *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), the issue is unpreserved. See *People v Noble*, 238 Mich App 647, 661; 608 NW2d 123 (1999). Our review of unpreserved claims of ineffective assistance of counsel is limited to errors apparent on the record. *Id.* Generally, all relevant evidence is admissible. MRE 402. "Relevant evidence" means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. The DNA evidence in this case was relevant because the evidence made it more probable that defendant committed the crimes.

Furthermore, the admission of evidence does not require a perfect chain of custody. *People v White*, 208 Mich App 126, 130; 527 NW2d 34 (1994). Once an adequate foundation for admission of the evidence has been established, any deficiency in the chain of custody goes

to the weight afforded to the evidence, rather than its admissibility. *Id.* at 133. We conclude that a sufficient foundation was laid for the admission of the DNA evidence in this case. An emergency room nurse testified that samples of the victim's blood, saliva, head hair, pubic hair, vaginal secretions, and fingernail clippings were collected and placed into a large manila envelope. She collected the victim's clothing and underwear and placed them in a bag. The nurse gave all of the evidence ("the rape kit") to a crime scene technician, who transported the rape kit to the police department and placed it in an evidence refrigerator. He testified:

At that point in time the procedure was that we brought the rape kit to our office and there was a refrigerator in our office at the police department that was dedicated to holding film and rape kits. Both had to be refrigerated at that time. And then Property Management in the morning would come in and take the rape kits out of our refrigerator and take them down into property and transfer them into their refrigerator.

The technician also testified that rape kits were either in a box or an envelope and were customarily sealed with tamper resistant tape. Although there was no testimony concerning the transfer of the rape kit from the office refrigerator to the refrigerator in the property management division at the police department, it can be reasonably inferred from the technician's testimony that it was transferred to the property management refrigerator by a member of the property management division as per protocol. More importantly, a police detective testified that, on October 25, 1995, he retrieved the rape kit from the property management division and transported it to the Michigan State Police (MSP) laboratory. At that time, the rape kit was contained within a white box. An employee from the MSP laboratory testified that he received the rape kit from the detective on October 25, 1995. At that time, the rape kit contained an envelope within a box. The MSP laboratory discovered sperm on the victim's underwear. However, at that time there were no viable suspects.

The original box and/or envelope that contained the evidence in this case was destroyed in 1997. However, the evidence itself remained stored in the MSP freezer. In November 2003, the police sent a vaginal swab from the victim and a cutting from the victim's underwear to Orchard Cellmark, a private laboratory, for a DNA analysis. Orchard Cellmark received the evidence, by mail, on November 6, 2003. The laboratory was able to obtain one male DNA profile from the victim's underwear, which it provided to the MSP crime lab. The MSP forensic science division used a computer program called "CODIS" to compare the DNA profile provided by Orchard Cellmark to over 150,000 known DNA profiles. The CODIS report indicated that defendant's DNA profile was consistent with the DNA found on the victim's underwear. The police obtained a search warrant to retrieve a "confirmation" buccal swab from defendant. A detective collected the swab and delivered it to the MSP. The MSP forensic science division tested the buccal swab and determined that defendant's DNA profile was, in fact, consistent with the DNA found on the victim's underwear.

Defendant argues that because the rape kit was destroyed in 1997, the prosecutor could not establish a proper chain of custody for the DNA evidence. However, the record clearly indicates that, although the original box or envelope that contained the DNA evidence was destroyed in 1997, the DNA evidence itself remained in the MSP freezer from 1995 until 2003, at which time it was sent to a private lab for testing. Nothing in the record supports that the evidence was in any way disturbed or contaminated between 1995 and 2003, or that it was

removed from the MSP freezer during that time. The chain of custody was substantially complete and, therefore, the trial court did not err in admitting the evidence. See *People v Herndon*, 246 Mich App 371, 405; 633 NW2d 376 (2001); *White, supra*. There were no errors apparent on the record to support defendant's claim of ineffective assistance of counsel with respect to the admission of the relevant DNA evidence. "Counsel is not ineffective for failing 'to advocate a meritless position.'" *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005), quoting *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant also contends that the trial court abused its discretion when it sentenced him to an indeterminate prison term that exceeded his life expectancy, and he argues that his sentence was not proportionate.

We review sentencing issues for an abuse of discretion. *People v Garza*, 246 Mich App 251, 256; 631 NW2d 764 (2001). Defendant argues, citing *People v Moore*, 432 Mich 311, 329; 439 NW2d 684 (1989), that because his minimum sentence for his CSC-I (with weapon) conviction is essentially 50 years, and because he was 45 years old when he was sentenced, it is not reasonably possible for him to actually serve that sentence. However, in *People v Kelly*, 213 Mich App 8, 15; 539 NW2d 538 (1995), this Court recognized that *Moore* was overruled by *People v Merriweather*, 447 Mich 799; 527 NW2d 460 (1994). Therefore, we are "no longer constrained to resentence a defendant because his indeterminate sentence is effectively a life term without parole" *Id.* at 15-16. A trial court has discretion to sentence a defendant convicted of CSC-I to imprisonment for life or any term of years. MCL 750.520b(2). A sentence that falls within this permissible range of sentences is lawful as long as it is proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Lemons*, 454 Mich 234, 258-260; 562 NW2d 447 (1997) (affirming a 45-year-old defendant's sentence of 60 to 90 years for his CSC-I convictions); *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Based on the serious and heinous nature of the crimes committed against the victim as outlined earlier in this opinion, we cannot say that the trial court abused its discretion in sentencing defendant in a manner that would provide "maximum protection for the public." Furthermore, in imposing sentence, a trial court must take into account "the background of the offender." *Milbourn, supra* at 651. The presentence investigation report (PSIR) in this case indicated that defendant had an extensive criminal history. Before defendant was convicted in this case, he was convicted of eight prior felonies and 13 prior misdemeanors. His criminal history included a conviction for attempted second-degree criminal sexual conduct, felonious assault, assault with intent to do great bodily harm less than murder, breaking and entering, larceny, false information to police, fleeing and eluding police, as well as various crimes involving drugs and alcohol. Thus, defendant has an extensive criminal history replete with convictions for dangerous and assaultive crimes. In addition, the PSIR indicated that defendant has a long history of substance abuse problems and that he had not been gainfully employed since 1993. Furthermore, trial testimony indicated that defendant committed these crimes only two months after being released from jail and the PSIR indicated that, at the time defendant was sentenced in this case, a CSC charge was pending against him. Thus, the record in this case clearly indicates that defendant had a low potential for rehabilitation. A defendant's low potential for rehabilitation is a legitimate consideration in imposing sentence. *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995).

Defendant asks this Court to consider the length of defendant's consecutive sentences in determining whether the sentences were proportional. The trial court had discretion to order defendant to serve his sentence for first-degree home invasion consecutively to his other sentences. MCL 750.110a; *People v St John*, 230 Mich App 644, 648; 585 NW2d 849 (1998). In determining the proportionality of a sentence, we are not required to consider the cumulative length of consecutive sentences. *Id.* at 649, citing *People v Miles*, 454 Mich 90, 95; 559 NW2d 299 (1997).

The record reveals that the trial court appropriately considered the seriousness of the offenses and defendant's circumstances and background in imposing the sentences in this case. Defendant's sentences were authorized by the Legislature and were proportionate to the seriousness of the offenses and offender. The trial court certainly did not abuse its discretion in sentencing defendant as it did. *Lemons, supra; Garza, supra.*

Affirmed.

/s/ Peter D. O'Connell
/s/ Christopher M. Murray
/s/ Alton T. Davis