STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHESTER MICHAEL DUPUIS, JR.,

Defendant-Appellant.

UNPUBLISHED
January 31, 1997

No. 186901
Saginaw Circuit Court
LC No. 93-008099-FC

Before: Griffin, P.J., and McDonald and C. W. Johnson*, JJ.

PER CURIAM.

Defendant appeals by right from his jury trial convictions for one count of breaking and entering an occupied dwelling with intent to commit a felony (B&E), MCL 750.110; MSA 28.305,[1] one count of assault with intent to commit first-degree criminal sexual conduct (assault with intent to commit CSC I), MCL 750.520g(1); MSA 28.788(7)(1), and six counts of CSC I, MCL 750.520b; MSA 28.788(2), including one count of CSC I based on anal penetration. Defendant broke into the home of the victim and repeatedly sexually assaulted her. He was sentenced to prison terms of ten to fifteen years for B&E, six to ten years for assault with intent to commit CSC I, and life for each of the six counts of CSC I. We reverse defendant's conviction on one count of CSC I and affirm defendant's other seven convictions and sentences.

Defendant first contends that there was insufficient evidence presented at trial to support his one conviction for CSC I based on anal penetration. We agree. Viewing the trial testimony in the light most favorable to the prosecution, *People v Medlyn*, 215 Mich App 338, 340; 544 NW2d 759 (1996), it is nonetheless clear that the victim's testimony unequivocally established that, although defendant attempted to penetrate the victim's anus several times, she was able to shift her body such that defendant never actually did so. As such, there was insufficient evidence presented for a rational trier of fact to find an essential element of the crime of CSC I (i.e., sexual penetration, MCL 750.520b(1); MSA 28.788(2)(1)) beyond a reasonable doubt, *Medlyn*, *supra* at 340, and defendant's single conviction based thereon must be set aside.

* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant next contends that he was denied a fair trial owing to three sets of prosecutorial remarks made during closing argument. We disagree. We first note that, with respect to the one set of remarks that defendant now contends constituted improper argument of facts not in evidence, defendant failed to object below. As such, defendant is not entitled to relief unless a curative instruction could not have eliminated any prejudicial effect or failure to review would result in a miscarriage of justice. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). We have reviewed the remarks in question and find that the prosecution's suggestion to the jury that the victim recognized her attacker's voice was a reasonable inference to be drawn by a rational factfinder from the evidence and was therefore permissible argument. *Id.*; *People v Lee*, 212 Mich App 228, 255; 537 NW2d 233 (1995). With regard to the other two sets of remarks which defendant now complains (i.e., alleged appeals to the jurors' civic duty and sympathy for the victim), we note that the trial court gave clear, contemporaneous curative instructions following both, and we conclude that defendant was not denied a fair and impartial trial. *McElhaney*, *supra* at 283.

Defendant next contends that he was denied the effective assistance of counsel at trial. Defendant first argues that his trial counsel was ineffective in failing to move for a directed verdict specifically with regard to the charge of CSC I based on anal penetration. Given our resolution of that issue as set forth above, we need not address this contention. Defendant next argues that his counsel was ineffective in failing to object to the prosecution's allegedly improper suggestion that the victim recognized her attacker's voice. However, given our conclusion that such was permissible argument, we find defendant's contention to be without merit. Finally, defendant argues that his counsel was ineffective in failing to preserve an alibi defense. We disagree. We note that although defendant's trial counsel did not comply with the statutory requirements for preserving such a defense, MCL 768.20; MSA 28.1043, the trial court nonetheless offered defendant the opportunity to present such evidence.[2] As such, even assuming counsel's failure to preserve the alibi defense was error, defendant has not shown that the result of the proceeding would have been different or that it was fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702; 555 NW2d 485 (1996).

Defendant next contends that his sentences were improperly disproportionate to the crimes committed and his background. We disagree. We first note that all of the sentences imposed by the trial court were within the recommended range of the sentencing guidelines and therefore presumptively proportionate. *People v Rivera*, 216 Mich App 648, 652; 550 NW2d 593 (1996). Although defendant maintains that his three prior felony offenses were of low severity, we note that such a circumstance is already explicitly contemplated by the guidelines, which, by operation of PRV 1 (prior high severity felony convictions) and PRV 2 (prior low severity felony convictions), specifically take into account the fact that a defendant's prior offenses may be of varying severity. Defendant also asserts that his crimes were "not more heinous" than other similar crimes. Whatever the merit of such a contention, however, defendant apparently fails to realize that it is in just such "typical" cases that straightforward adherence to the guidelines is appropriate.

Finally, defendant contends that his sentences constitute cruel and unusual punishment. We disagree. To the extent defendant challenges the punishment imposed, he offers no support for his assertion that his sentences were disparate from others imposed for similar crimes under similar

circumstances. In any event, defendant is certainly not the first to be sentenced to life in prison for first-degree criminal sexual conduct. E.g., *People v Austin*, 209 Mich App 564; 531 NW2d 811 (1995), lv gtd 453 Mich 943 (1996). Similarly, to the extent defendant challenges the statutorily-provided penalty for CSC I, i.e., "life . . . or any term of years," MCL 750.520b(2); MSA 28.788(2)(2), he offers none of the analysis adopted by our Supreme Court in *People v Lorentzen*, 387 Mich 167, 176-181; 194 NW2d 827 (1972), i.e., he completely fails to discuss (1) the gravity of the offense and the harshness of the statutory penalty; (2) the comparable sentences imposed on other criminals in Michigan; or (3) comparable sentences imposed for the same crime in other jurisdictions. See also *People v Bullock*, 440 Mich 15, 33-35; 485 NW2d 866 (1992). Given defendant's lack of argument and authorities, we decline to undertake such a constitutional analysis. *People v Allen*, 192 Mich App 592, 605; 481 NW2d 800 (1992).

Defendant's conviction for one count of CSC I based on anal penetration is reversed. Defendant's seven other convictions and sentences are affirmed.

/s/ Richard Allen Griffin
/s/ Gary R. McDonald
/s/ Charles W. Johnson

[1] The offense was committed prior to the 1994 amendment of the statute.

[2] We do not understand defendant's argument that the trial court's offer was unfairly "unpalatable" because it was conditioned on an overnight recess in order to afford the prosecution the opportunity to interview witnesses and meet defendant's alibi. Such is, in fact, far less than the analogous *ten-day* statutory notice requirement. MCL 768.20; MSA 28.1043.