

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FAHMI MAHMOUD BILBEISI,

Defendant-Appellant.

UNPUBLISHED

March 4, 1997

No. 188717

Washtenaw Circuit Court

LC No. 94-003206-FH

Before: Murphy, P.J., and Markey and A.A. Monton,* JJ.

PER CURIAM.

Defendant was convicted in a bench trial of fourth-degree criminal sexual conduct, MCL 750.520e(1)(a); MSA 28.788(5)(1)(a). He was sentenced to three years' probation with the first 30 days to be served in jail. He appeals as of right. We affirm.

I

Defendant first argues that he is entitled to an evidentiary hearing to make a record before the trial court regarding his claim of ineffective assistance of counsel. We disagree.

Defendant argues that his trial counsel was ineffective and prejudiced his right to a fair trial for failing to raise the issue of defendant's competency and for failing to seek an interpreter to assist defendant in his difficulties with the English language. There is nothing in the lower court record upon which we can make a finding of ineffective assistance of counsel. Where a defendant's claim is based on facts not contained in the record, the defendant must make a testimonial record in connection with a motion for a new trial or an evidentiary hearing. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Such a motion was made and denied in the present case, where defendant's counsel failed to appear for the motion.

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

Defendant now claims that he is entitled to remand for an evidentiary hearing. When a remand procedure is available, it is not mandatory; this Court must make a discretionary decision as to whether the remand should be granted. *People v Hernandez*, 443 Mich 1, 15; 503 NW2d 629 (1993). Further, a party seeking a remand must meet the requirements of MCR 7.211(C)(1). *Hernandez, supra* at 21. In the present case, defendant has failed to meet the specific requirement set forth in MCR 7.211(C)(1)(a)(ii). Defendant's broad assertions that he was incompetent and incapable of understanding the English language and that his trial counsel was ineffective for failing to raise these issues at trial are unsupported by either affidavit or an offer of proof. He offers no realistic guidance to this Court to warrant his request for a remand. Therefore, we conclude that defendant was not denied effective assistance of counsel and we deny his request for a remand on this issue.

II

Defendant next argues that highly prejudicial other bad acts evidence was improperly admitted contrary to MRE 404(b). We disagree.

Defendant argues that the victim's testimony in this case was contradictory and incredible and that, because her identification of the perpetrator was tainted, the admission of bad acts evidence to prove identity was improper. Defendant also argues that the prosecutor's theory was to prove defendant's identity as the perpetrator of the crime by showing that he matched the *modus operandi*. MRE 404(b) states that evidence of other bad acts is inadmissible to prove a person's character in order to show action in conformity therewith, but it is properly "admissible for other purposes, such as . . . identity." Our Supreme Court, in *People v Golochowicz*, 413 Mich 298, 309; 319 NW2d 518 (1982), listed certain safeguards which must be met when using other act evidence to prove identity. Our Supreme Court later rejected the *Golochowicz* test as the standard for determining admissibility of other bad acts evidence, *People v VanderVliet*, 444 Mich 52, 65-66; 508 NW2d 114 (1993), modified on other grounds 445 Mich 1205; 520 NW2d 338 (1994); however, as clarified by this Court in *People v McMillan*, 213 Mich App 134, 138; 539 NW2d 553 (1995), the Court in *VanderVliet* also stated that *Golochowicz* provided the proper analysis for determining logical relevance when the prosecution is utilizing a *modus operandi* theory to prove identity. *VanderVliet, supra* at 66.

Defendant does not argue that the *Golochowicz* test was not met, but instead argues that the testimony of the various witnesses was inconsistent and therefore the evidence was not really offered to prove identity but was offered to prove conformity of character. The trial court stated, however, that it was allowing the other acts evidence to be admitted only for identity purposes. We review the trial court's decision for an abuse of discretion. *McMillan, supra* at 137. We conclude that the trial court did not abuse its discretion in this case where the court itself was the factfinder and stated on the record that it considered the bad acts evidence only for the issue of identity. Further, this Court will not address defendant's argument regarding the credibility of the witnesses because questions of credibility are to be decided by the factfinder and are not reviewed by this Court. *In re Robinson*, 180 Mich App 454, 463-464; 447 NW2d 765 (1989).

III

Defendant next argues that absent the other bad acts evidence discussed above, there was insufficient evidence to establish beyond a reasonable doubt that defendant committed the crime charged. Again, we disagree.

Defendant's conviction requires a showing that he used force or coercion to engage in sexual contact with another person. *People v Cowley*, 174 Mich App 76, 79; 435 NW2d 458 (1989). MCL 750.520e(1)(a); MSA 28.788(5)(1)(a) further states that force or coercion includes but is not limited to the circumstances set forth in MCL 750.520b(1)(f)(i) to (iv); MSA 28.788(2)(1)(f)(i) to (iv). *Id.* at 79-80. Defendant correctly states that the element of force or coercion can be proven not only by the circumstances delineated in the statute but also by a finding of a reasonable fear of dangerous consequences. *People v McGill*, 131 Mich App 465, 473-475; 346 NW2d 572 (1984). However, defendant incorrectly argues that a reasonable fear was not proven in this case because the victim's testimony was not believable. In reviewing the sufficiency of evidence, this Court must view the evidence in the light most favorable to the prosecution and decide whether the evidence is sufficient to justify a reasonable trier of fact in finding that the elements were proved beyond a reasonable doubt; we must refrain from weighing the evidence or the witnesses' credibility. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992); *McMillan*, *supra* at 139. Therefore, we are not concerned with whether the trial court chose to believe the victim's testimony.

Although we have already concluded that the other bad acts evidence was properly admitted, see § II, *supra*, even without the admission of that evidence, we conclude that there was sufficient evidence in this case which, if viewed in the light most favorable to the prosecution, would justify a reasonable trier of fact in finding that defendant committed fourth-degree criminal sexual conduct. See *People v Duenaz*, 148 Mich App 60, 64-65; 384 NW2d 79 (1985).

IV

Finally, defendant argues that he is entitled to resentencing because his sentence exceeded the statutory maximum. Again, we disagree.

Defendant's argument has no logical basis. As stated above, he was sentenced to three years' probation and 30 days in jail. MCL 750.520e(2); MSA 28.788(5)(2) states:

Criminal sexual conduct in the fourth degree is a misdemeanor punishable by imprisonment for not more than 2 years, or by a fine of not more than \$500.00, or both.

Three years of *probation* is not equal to three years of *imprisonment*; in fact, the length of defendant's imprisonment is 30 days and is therefore well below the statutory maximum of two years. Further, defendant accepted the three years' probation recommendation at the sentencing hearing and argued only that the court consider waiving the 30 days of jail time. We conclude that resentencing is not necessary.

Affirmed.

/s/ William B. Murphy
/s/ Jane E. Markey
/s/ Anthony A. Monton